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A

TREATISE

OF

Trover and *Converſion*;

OR THE

LAW of Actions on the Caſe for *TORTS* and *WRONGS*;

WHEREIN

All the CASES concerning ſuch Actions, are digeſted under their proper Heads.

VIZ.

I. For Trover and Converſion of Goods.
II. For Malicious Proſecutions.
III. For Nuſances.
IV. For Diſceits and on Warranties.
V. On the Common Cuſtom againſt Carriers, Inkeepers, *&c.*

To which is added,

Several Select PRECEDENTS of Declarations and Pleas in ſuch Actions, and References to all that are extant in the Books of Entries.

The Second Edition, with large Additions.

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PH
MVSEVM
BRITANNICVM

THE PREFACE.

OF all the Alterations that the Law of England *hath undergone in the Succeſſion of ſo many Ages, the great Encreaſe of Actions on the Caſe ſeems to be the moſt conſiderable; the Reaſon of this the Reader will ſee in the enſuing Sheets; therefore we need only now obſerve the Importance of the Subject, and the Manner it is here treated of.*

What the Subject is may be seen in the Title; and a very little Knowledge of the Proceedings in the Courts of Westminster-Hall, *or at the Assizes, will abundantly prove that the Learning of* Actions on the Case *is of universal Use, there being more of them tried in those Places, than there is of all the various Actions now in Use, (Ejectments only excepted.)*

Actions on the Case, *being so called, as one of our Law-Writers observes, because they are so various that no General Writ could be framed to answer every Wrong, the Reader will not expect that any exact Method could be found to digest them in; for which Reason 'twas judged most useful to place the Cases that occur in our Law-Books under such Titles as they are most commonly distinguished by.*

Where

Where the Number of Cases concerning one Action exceeded the common Length of a Chapter, they are distributed into several, as the Reader may see in that Part of this Book which concern Actions of Trover; but where the Number of Cases did not necessitate such a Division, 'twas found more useful to reduce them all to one Chapter, and to divide that Chapter into several Sections, which is the Method observed in the other Titles of this Collection: Actions on the Case themselves, considering the nice Distinctions that occur, and that the least Circumstance in these Actions is of Import, and the great Variety of Opinions contradicting one another that occur in our Books; many of these Cases could not be abridged without lessening the Use of this Collection; nor could one of those opposite Authorities be left out of this Treatise without per-

forming leſs than is promiſed in the Title Page, and arrogating to our ſelves what no private Perſon ought, to determine what is Law, where the Courts of Juſtice are dubious.

The Reader will probably find by the Peruſal of the enſuing Sheets that Actions on the Caſe will lie for Wrongs, for which no proper way was thought to be found at Common Law.

The

THE NAMES OF THE AUTHORS that are cited in the following Book, with ſuch Abbreviations as are uſed for their Names.

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2 And.	——— ———2d *Part.*
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And Note, That is here called the firſt Volume which is firſt in Time, and ſo of the 2d and 3d.

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Dav.	Davis's *Reports.*
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Golds.	Goldsborough's *Reports.*

H.

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Hern.	Hern's *Pleader.*

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Lit.	Littleton's *Reports.*

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S.

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W.

Win. R.	Winch's *Reports.*
Win. E.	——— *Entries.*

Y.

Yel.	Yelverton's *Reports.*
	The Year-Books.

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Of Actions on the Caſe for Diſceits and on Warranties.

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SECT. I.

——— *Againſt Common Carriers.*

SECT. II.

——— *Againſt Inn-keepers.*

OF Actions on the Case FOR Trover *and* Conversion.

CHAP. I.

Of the Nature of Actions of Trover and Conversion: What Actions it may not be joined with: Of the Court where it may be brought: Of the Bail.

ACTIONS on the Case in general, being more frequent of late Years than formerly, those especially for Trover and Conversion of Goods, their Learning is become both voluminous, and of great Import: Whence this has proceeded, and how the Law antiently stood, is necessary to be inquired into, in Order to illustrate the ensuing Treatise.

That these Actions are become more common of late.

A Man's Goods may be out of his own Possession, and in that of another's, three several Ways.

How many Ways Goods may be out of the Owner's Possession.

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A Man's Goods may be out of his own Possession, and in that of another's, three several Ways. How many Ways Goods may be out of the Owner's Possession.

First, By some Act of his own, and with his own Consent; as where Goods are bailed.

Secondly, Without his own Consent, and by Accident; as where Goods are lost by the Owner, and are found by another.

Thirdly, They may come to the Hands of another, not only without, but against the Consent of the Owners; as when they are forcibly taken away.

Proper Actions in those several Cases.

By the Wisdom of our Law, three several, and indeed adequate, Remedies were given for these Wrongs, *viz.* for the 1st, an Action of *Detinue*; in the 2d, of *Trover* and *Conversion*; in the 3d, an Action of *Trespass*. Originally the Differences were nicely observed, tho' now they seem to be confounded, and almost lost. How this has been brought about, and why, is what has been proposed to be enquired into; the Reader will judge whether it had not been better they had been preserved.

The Nature of an Action of Detinue, and where it lay.

An Action of Detinue is an Action founded on a real or supposed Detaining of Goods or Chattels, which the Party by some Contract is bound to deliver to the Owner; so only lies against one who is under that Obligation, either by express Contract, or by one arising by Operation of Law. For as in Actions of Debt on a simple Contract, the Party was by a parol Agreement bound to pay for Goods, so here he was under the like Obligation to deliver them; and because the Money might

might be paid or the Goods delivered in Private, in both these Cases the Defendant had the Benefit of waging his Law; and as this Privilege occasioned the Disuse of Actions on Debt on simple Contract, so has it likewise wrought the same Effect as to Actions of Detinue; and as that is supplied by an Action on the Case on the Promise, so is this by that of Trover and Conversion; and both these Actions seem to have been thus extended beyond their original Bounds much about the same Time, *viz.* the latter End of Queen *Eliz.*

Now Disused, and why.

Nor have Actions on Trover and Conversion less encroached on Actions of Trespass, the original and proper Remedy for the Recovery of Damages, for Goods forcibly taken; for since the Case of *Bishop* and the Viscount of *Montacute*, (which memorable Case the Reader will find at Length in the 3d Chapter of this Treatise) the Doctrine there advanced, that the Plaintiff may qualify, but not increase a Tort; and therefore tho' Trespass would lie, yet it did not follow Trover would not, seems to be established.

Trespass for Goods, when the most proper Remedy.

In Consequence of which Trover is often brought on Wrongs, for which Trespass was originally the only, and still is the more proper Action, of which many Instances will occur in our 3d Chapter. The Reason seems to be the great Latitude of giving most Things in Evidence on the General Issue in Trovers, which in Actions of Trespass must appear on the Pleadings, which has render'd it more easy to those who are not versed in that

An Action of Trover, often brought in such Cases, and why.

Learning. Thus we may obſerve that this Action, originally deſigned for the recovering the Value of Goods caſually loſt, is become the common Remedy in moſt other Caſes; nay, tho' it was deſign'd to try the Right to perſonal Things, yet many Inſtances will be found in the Sequel, where the Title to Land has been in Queſtion, and determined in this perſonal Action.

Trover defined.

It may be defined an Action on the Caſe, for the recovering the Value of Goods or Chattels.

The Converſion is the Gift of the Action.

The Converſion is the Gift of the Action; for if one finds the Goods of another, and preſerves them till the right Owner claims them, he receives no Wrong, and conſequently can have no Action; but if they are uſed by the Party that finds them, this indeed is a Violation of the Owner's Property, ſtrictly ſpeaking, who therefore is intitled to an Action; for this Cauſe the Converſion is is ſaid to be the Foundation of the Action; and altho' it was alledged in the Declaration, that the Goods came to the Hands of the Defendant by Finding, to the end it might appear upon the Record, that the Plaintiff was intitled to this Action, and not Detinue or Treſpaſs; becauſe, as we have obſerved, by the old Law theſe Actions were proper Remedies for Injuries of ſeveral and diſtinct Natures; tho' the Reaſon of alledging the Trover in the Declaration is gone, yet in this, and many other Caſes, the old Forms are ſtill retained and uſed.

In

In Case on the Custom of the Realm, and Trover against a Carrier, join'd in the same Declaration, after Verdict for the Plaintiff, and entire Damages, Judgment was arrested; for the *Assumpsit* is *ex quasi Contractus*, and a Contract and a Tort cannot be joined; and in the Case of *Mathews* and *Hopkins*, 1 *Sid.* 244. the Judgment was arrested; the Record of which Case, *Holt*, Ch. Just. said, he had seen. 1 *Salk.* 10. Sir *John Dalston ver. Jenson. S. C.* 5 *Mod.* 89.

Case on Custom of Realm and Trover, not joinable in Action against Carrier.

See 2 *Sid.* 244. *S. C.* 2 *Lev.* 101. *S. C. Raym.* 233. 3 *Lev.* 99. Yet 1 *Ventr.* 223. says, These two Actions may be joined, but it does not seem to be Law.

Two Causes of Action of Trover cannot be join'd in one Action. *Trin.* 23. *C. B. R. Style's Pract. Reg.* 326.

Two Travers.

The Writ is general, the *Acetiam* is *pro conversione & dispositione bonorum & catallorum ipsius Quer' ad Valentiam* 100 *l.* 1 Keb. 598.

The Writ and *Acetiam*.

Error of a Judgment in the Common Bench, in an Action of Trover and Conversion of Goods. The Writ supposeth, that such a Day, *apud Alston in Comitat. Suff.* he was possessed, *&c.* and lost them, and the Defendant found them, and converted them to his own Use; and in the Count he sheweth the Trover and Conversion to be at *Alston* aforesaid; and the Error was assigned, because the Place of Conversion was not shewn in the Writ.

Writ in Trover and Conversion, how to be.

And now *Maynard*, for the Plaintiff in the Writ of Error, argued, That the Place of Conversion ought to be shewn in the Writ; for it being an Action upon the Case, the Count otherwise is not

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Writ in Trover and Conversion, how to be.

And now *Maynard*, for the Plaintiff in the Writ of Error, argued, That the Place of Conversion ought to be shewn in the Writ; for it being an Action upon the Case, the Count otherwise is not

good; and for that Purpoſe he vouched 3 *Hen.* 6. 48 *E.* 3. 6.

The Court held, That the Writ was good enough; for the Poſſeſſion ſuppoſed to be at *Alſton*, and the Trover and Converſion being all conjoin'd with a Copulative, ſhall be intended all in one Place, (*viz.*) at *Alſton*, eſpecially the Count mentioning the Converſion to be at *Alſton*, and the Iſſue there tried, and Verdict given. But *Berkeley* ſaid, If the Writ be vitious for this Cauſe, it is not aided by the Verdict. But 'twas agreed, That as this Caſe is, the Writ is good; whereupon Rule was given, That Judgment ſhould be affirmed, unleſs, &c. 3 *Cro.* 525. *White ver. Hunbye.*

May be General.

In an Action of Trover, 'twas aſſign'd for Error, that the Writ was *Quod fuit poſſeſſionatus de diverſis Bonis & Catallis ad valentiam*, 20 *l.* and loſt them, which came to the Defendant's Hands, and he converted them: The Writ doth not mention any Goods in Specie; but the Declaration was, *quod fuit poſſeſſionatus de duabus Cadis de* Claret-wine, and one Hogſhead of White-wine, and doth not mention any Value. So the Writ and Declaration do not meet, nor doth it appear that the Declaration is founded upon the Writ. And when the Declaration varies from the Writ in Subſtance, it is not aided by the Statute 18 *Eliz.* And altho' the Statute helps where there is no Original, or that the Original be varied in Form, yet it doth not ſo where the Original varies from the Declaration in matter of Subſtance, as 'tis held, *Co. Lib.* 5. *f.* 37.

Want of the Value of the Goods in the Writ, is aided by Verdict.

Biſhop's

Bishop's Case; *sed non allocatur*: For they held, That *ad valentiam* is not Matter of Substance in the Declaration; and being after Verdict is aided by the Statute; wherefore the Judgment was affirmed. 2 *Cro.* 653. *Bradford versus Ramsey*. See 2 *Cro.* 294. and *Noy*, 139.

Trover may be brought either in the County where the Trover was, or where the Conversion was.

In Trover and Conversion for certain Jewels; the Trover being laid to be in *Kent*, but the offering the Goods to sell, being in *London*, it was doubted where the Trial should be; and the Court said, That generally a transitory Action is to be laid where the Fact was done, yet the Party is not tied to lay it there, but may lay it in another County; and in this Case it was held by the Court, That the Plaintiff may bring his Action where the Jewels were sold, and that was in *London*, as well as in *Kent*, where the Trover was laid; for Part of the Ground of the Action, to wit, the Conversion, was in *London*, though Part of it, namely, the Trover, was laid to be in *Kent*. 1 *Style* 15. The Earl of *Leicester* against Mrs. *Samford*.

When the Title to Lands will come in Question, Trover is a local Action.

In the beginning Actions of Trover, tho' they concern'd the Reality, as for Heriots, *&c.* were brought in foreign Counties, where the Trover was supposed; but when 'twas observed that thereby the Right to Freeholds was tried in Counties where the Land did not lie, 'twas agreed by all the Judges of *England*, that the same should not be suffer'd for the future; and *per Ley*, Chief Justice, and *Doddridge*, this is now Common Law. 2 *Roll. Rep.* 456. See 1 *Brownl.* 35.

Trover and Converſion was brought in *Middleſex*, for ſeveral Quarters of Corn; 'twas moved, that the *Venue* ſhouldbe ſomewhere on the Confines of *Wales*, becauſe the Corn grew there, and the Title to the Land would come in Queſtion; but the Action being brought in the King's Bench by Original, and not by Bill, the Court would not compel the Plaintiff to change his County; for the Secondary inform'd the Court, that a Suit commenced by Original *in Banco Regis*, may be laid in what County the Plaintiff thinks fit, and that the Court cannot force the Plaintiff to change it by the Courſe of the Court; yet the Judges ſaid, If the Defendant by Pleading could draw the Title of the Lands into Queſtion, then they would compel the Plaintiff to lay his Action where the Land was. See 2 *Roll. Rep.* 141. *Floide v. Bethold.*

Whether *Marſhalſea* can hold Plea of Trover, where neither Patry is *del Hoſtel du Roy.*

Error was brought of a Judgment in an Action upon the Caſe, upon a Trover in the *Marſhalſea.* Trover and Converſion being ſuppoſed at *Southwark*, within the Verge, and adjudged for the Plaintiff. The Error aſſigned was, becauſe none of the Parties were *del Hoſtel le Royne*, nor living within the Verge; and it was thereupon demurred. And *Godfrey* moved, That for this Cauſe it was erroneous, for that Court cannot hold Pleas betwixt Strangers; and in proof thereof, he cited a Precedent, *Hill.* 1 *Ed.* 4. *Rot.* 47. and the Book of *Entries*, 278. 10 *H.* 6. 13. 7 *H.* 6. 31. *Popham* and *Fenner* held, That the Action well lay; for the Statute of *Articuli ſuper Chartas, cap.* 3. which ſhews

ſhews that Treſpaſſes ſhall not be brought there, nor Action betwixt others than *Hoſtel* of the King, is intended of Treſpaſſes for Land, and not of ſuch perſonal Actions. And there be many Precedents, that in all Times ſuch perſonal Actions have been there brought, and adjudged: But *Gawdy* doubted thereof. But they all held, That if the Action be not maintainable there, the Judgment is void; yet Error lies thereof; *ſed adjourn'*.

Note, Another Precedent was ſhewn in *Mich.* 32 *H.* 6. *Rot.* 27. betwixt *Rede* and *Furcas*. Error of a Judgment in Treſpaſs in the *Marſhalſea*, becauſe none of them were *del Hoſtel du Roy*, and reverſed. 1 *Cro.* 502. *Baptiſt v. Michelbourn.* 6 *Co.* 20 *b. S. C.* See 1 *Bulſt.* 207.

Of Bail in Trover.

There muſt be ſpecial Bail in Trover, and if Exception is taken to Bail, and new Bail is put, and new Exception is taken to them, *Quære*, Whether Notice thereof muſt be given? And alſo, Whether, if the Bail that is given to the Sheriff be put in to the Action, whether they may be excepted againſt? *Modern Caſes*, 14. *Bangley v. Tidcomb.*

Bail in Trover removed by *Habeas Corpus*.

In Trover and Converſion for a Ship, which the Defendant condemned for want of being regiſtred in *England*; the Action was laid in *London*, and being moved by *Habeas Corpus* to the King's Bench, the Queſtion was, Whether there ſhould be Bail as this Caſe ſtood? And *Holt* ſaid, That though it was upon an *Habeas Corpus*, they might enquire into the Cauſe of Action, and if they ſaw occaſion, order Special Bail; for otherwiſe

wiſe inferior Courts might be made Uſe of to oppreſs People, by laying great Actions upon them there; and here, if the Defendant has acted as Judge, and the Matter was within his Cognizance, his Sentence, whether right or wrong, binds till it be reverſed; and if it were in the Admiralty of *France* it would be ſo; and the only Remedy in ſuch Caſe is to appeal. *Fareſt.* 9. *Lumley v. Quarry*, Judge of the the Admiralty in *Penſilvania*.

CHAP. II.

Of the Perſons by and againſt whom this Action may be brought, viz. *Executors, Baron and Feme, Aſſignees of the Commiſſioners of Bankrupts, Lunaticks and Jointenants.*

Whether an Adminiſtrator, Plaintiff, ſhall pay Coſts.

AN Adminiſtrator brought Trover and Converſion, and declared, That the Inteſtate at the time of his Death was poſſeſſed of divers Goods, and that after his Death, and before Adminiſtration committed, they came to the Defendant's Hands, who converted them: Upon Not guilty, it was found for the Defendant, and prayed that he might have Coſts; and the Court held, That he ought to have them, the Converſion being ſince the Death of the Inteſtate. 1 *Vent.* 109. With this Caſe agrees the Reſolution in *Latch* 220. *Worfeild v. Worfeild*, and 3 *Cro.* 219. *Atkey v. Earl*; but in 3 *Lev* p. 60. *Ma-*

Mason v. Jackson, the Plaintiff, who was an Administrator, declared that he himself was possessed of Goods, and that they came to the Defendant's Hands by Trover, who converted them, *&c.* 'Twas resolved, That the Plaintiff, tho' Verdict for the Defendant, should pay no Costs. *Ideo Quære.*

Letters of Administration do relate to the Time of the Death of the Intestate, and not to that of the granting them; and therefore an Administrator may bring an Action of Trespass, or Trover and Conversion, for Goods of the Intestate, taken by one before the Letters of Administration granted unto him; otherwise there would be no Remedy for this Wrong done; *per Rolle*, Chief Just. *Style's Rep.* 341.

Administrator may bring Trover for Goods taken before Letters of Administration were granted.

An Administrator to whom Administration is committed by a Peculiar, if he doth not set forth in his Declaration, that he was *loci illius Ordinarius*, shall, notwithstanding such Omission, after a Verdict have Judgment. 1 *Cro. Lacy v. Smith.*

Need not set forth the Power of the Peculiar that granted them.

Upon a Trial at *Nisi prius*, at *Guildhall*, before my Lord Chief Justice *North*, in Trover and Conversion against an Executor *de son Tort*. The Question came to be, Whether the Goods having been taken in Execution, upon a Judgment obtained against the Defendant by a Creditor of the Deceased, should discharge him against the Plaintiff, who who brought this Action as Administrator? And the Opinion of the Chief Justice was, That this Execution was a good Discharge against another Creditor that should sue him, to whom he might plead *Riens*

The Administrator may bring Trover. *v.* Executor *de son Tort*, notwithstanding the Goods were taken from him by an Execution.

Riens inter ses mains; but it was no discharge against an Administrator, for Men must not be encouraged to meddle with a personal Estate without Right: But to prevent this Mischief, where the Party dies Intestate, and there is Contest about the Administration, a Man may procure of the Ordinary Letters *ad Colligendum* 1 *Vent.* 349.

Administrator cannot bring Trover for Cattle after his Consent to the Defendants having it before Administration granted.

In an Action of Trover by the Plaintiff as Administrator of *J. M* for a Gelding; on not Guilty pleaded the Jury found a Special Verdict, *viz.* That *J. M.* was possessed of the Gelding, and put him to the Defendant to pasture, and died Intestate, that before Administration granted, the Plaintiff desired the Defendant to bury *J. M.* decently, who accordingly buried him, and laid out 23 *l.* therein, whereupon the Plaintiff agreed, That the Defendant should have the Horse in part of Satisfaction of the Funeral Charges, and for 13 *l.* Residue thereof gave him his Note, afterwards the Plaintiff took out Administration, and now brought Trover for the Horse; and *Holt*, Ch. J. was of Opinion, that the Action well lay; for that the Defendant was a Tort Executor, and the Plaintiff's Consent, when he had nothing to do, would not alter the Case; for if he had then released, yet he might have taken Administration, and brought an Action afterwards. But *Dolben* and *Eyre*, Justices, *contra*; and the Defendant had Judgment. 1 *Salk.* 295. *Whitehal v. Squire*, S. C. 3 *Mod.* 276.

In

In Trover and Conversion of Goods. Upon Demurrer, the Case was, The Ordinary committed Administration of the Goods of an Intestate to the Defendant; afterwards the next of Kin sues a Citation in Court-Christian against the Defendant, to repeal the Administration, and he *pedente lite* sells those Goods, and afterwards his Administration is repealed, and Administration committed to the Plaintiff, who for this Conversion, *pedente lite*, brings this Action; and 'twas moved for the Defendant, That the Action lies not; for the Administration at the Common Law is well committed, and the Statute doth not alter the Law in this Point, but gives a Penalty against the Ordinary, if he commits them not to the next of Kin; and the Administrator, until Administration repealed, hath an absolute Authority to dispose of the Goods as he pleases. *Tanfeild contra.* The Conversion *pedente lite* in Court-Christian is not lawful, but is a Tort to the Plaintiff, and that the Sentence there proves; which is, that all Things exempted, or done *pedente lite*, shall be void; and the Justices ought to have Regard to the Civil Law in this Point, as in 27 *H.* 6. *Gard.* 118. 2 *R.* 2. *Quare Impedit*, 143 and 4 *H.* 7. 13. And by the Sentence it appears that the Administration is revoked as if it had never been. And upon this Reason it is in *Dyer*, 339. where an Administrator recovered a Debt, and afterwards another procured himself to be joined in the Administration, and released the Debt, and afterwards it being revoked,

Administrator *pedente lite* to repeal the the Administration, sells the Goods. Qu. Whether Trover lies for the new Administrator?

ked, this Releaſe was not any Bar to the Execution; and *Mich.* 35 and 36 *Eliz.* in the Common Bench, between *White* and *Cary*, this very Point was in queſtion, and adjudged, that the Action lay. *Gawdy.* The Action well lies; for the Sentence does not repeal mean Actions, Acts done by an Adminiſtrator which are for the Inteſtate's Benefit; but foraſmuch as theſe Goods were not converted or employed for the Inteſtate's Uſe, it is reaſonable that he ſhould be charged for them. *Popham* and *Fenner, econtra.* For the Adminiſtrator hath an abſolute and lawful Intereſt and Power to diſpoſe of the Goods until Repeal be made, and it is not like to an Appeal upon a Sentence, for that makes it as no Sentence; but the Repeal of the Letters of Adminiſtration doth not award it *ab initio*, and make a lawful Act tortious; but rather in this Caſe, the new Adminiſtrator ſhall have an Account for the Moneys received, and the Words in the Sentence be not to be regarded, for they are ordinary in all Sentences. So he having the Goods lawfully, and converting them lawfully, ſhall not anſwer for them as for a Tort done. And *Popham* here ſaid, If Adminiſtration being committed, the Ordinary commits new Adminiſtration, it is a Repeal of the former, without any Sentence of Repeal; and if the firſt Adminiſtrator waſte the Goods, the Debtee ſhall have the Action againſt him; and if he pleads, that Adminiſtration is committed over, he may well by his Replication maintain it, becauſe he waſted the Goods when he was

Administrator; whereof, *&c. Et adjournatur*: But afterwards the Action was discontinued by the Plaintiff. 1 *Cro.* 469. *Willson v. Packman.* 6 *Co.* 18. *S. C.* and *Moore* 396.

If after Verdict, and before the Day in Bank, or after Judgment, the Plaintiff's Letters of Administration are repealed, whereby the Defendant becomes liable to the new Administrator, he cannot in either Case aid himself by Plea, but shall be relieved on an *Audita Querela*. *Yelv.* 125. *Ket v. Life.* 2 *Saund.* 147. *Turner v. Davis.*

When *Audita Querela* lies on Judgment obtained by an Administrator.

It hath formerly been a Doubt, whether Executors could maintain an Action of Trover, and it hath been insisted that an Action of Trespass, *de bonis asportatis in vita Testatoris*, was their proper Remedy: And it appears by *Savil, Rep. p.* 133. that this Opinion prevail'd once; and in *Goldsb. p.* 89. 'twas doubted: Soon after, as appears by the Case of the Countess of of *Rutland*, in *Cro.* 377. *Moore* 266. and *Owen*, 156, and by the Case of *Russel* and *Prat*, reported in 1 *And. p.* 177. *Moore* 146. 5 *Co.* 274. 4 *Leon.* 44. and *Noy* 70. it was solemnly adjudged, that Executors might maintain an Action of Trover and Conversion; nor does it appear That this Point was ever question'd since, tho' many such Actions have been brought.

Executors may bring Trover.

Error of a Judgment in the Common Bench, in an Action *sur* Trover, where the Plaintiff declared, *quod cum possessionatus fuit de* 40 l. *in quadam crumena existent. ut de bonis suis propriis*, and lost them, and the Defendant found and converted them

Declaration in Trover for Money in a Purse by an Executor, how to be.

to

to his own Uſe, *in retardationem Executionis Teſtamenti*, to the Plaintiff's Damage of 40 *l.* The Defendant pleaded, Not guilty, and found for the Plaintiff, and the Jury aſſeſſed for Damages, 40 *l.* and for Coſts, 20 *s.* and the Plaintiff had Judgment accordingly; and thereupon Error was brought: The firſt Error aſſigned was, Becauſe he alledgeth not that he was poſſeſſed of a Purſe, but only of 40 *l.* in the Purſe, and the Converſion is laid for both; and Damages given intirely for both; *ſed non allocatur*, for it ſhall be neceſſarily intended. And ſo is 21 *H.* 6. in Detinue: And 2dly, Becauſe 'tis alledged, that he was poſſeſſed of 40 *l. ut de bonis ſuis propriis*, and that the Defendant converted them *in retardationem Executionis Teſtamenti*, which is contrariant, *&c.* The Goods being his proper Goods, that they ſhould be converted *in retardationem Executionis Teſtamenti*; and for this Repugnancy it was ill. And of that Opinion was *Fenner*, Juſtice, and in Proof thereof relied upon 25 *E.* 3. 40. and *Sale's* Caſe, 31 *Eliz.* But all the other Juſtices *econtra*; for the Executor is poſſeſſed of the Teſtator's Goods, as *de bonis ſuis propriis*, and ſo may declare. And yet the Converſion of them is *in retardationem Executionis Teſtamenti*: And this Exception was taken in the Counteſs of *Rutland's* Caſe, in this Court, and yet held to be good; for theſe Words are but Surpluſage, which do not abate the Count. The third Error aſſigned was, Becauſe he counts but of 40 *l.* Damages, and the Damages and Coſts aſſigned by the Jury exceed

exceed the Sum whereof he declares, which ought not to be, and therefore it is erroneous; and to that Purpose 13 *H.* 7. 16. 18 *H.* 6. 17. and 2 *H* 6. 7. were cited. *Sed non allocatur*; for the Damages ought not to be assessed more than whereof the Plaintiff himself hath counted. But because the Suit might for a longer while have depended, they may be further assessed and encreased. For *non constat* at the Time of the Declaration what the Costs of Suit would amount unto; but if the Damages and Costs had been entirely assessed at more than are mentioned in the Declaration, it had been ill. For *non constat*, but that the Damages exceed the Damages mentioned in the Declaration; wherefore it was adjudged accordingly, and the first Judgment affirmed. 1 *Cro.* 568. *Rivers v. Godskirt.*

How to alledge a Possession in Executors.

Hill. 15. *Jac.* An Exception was taken to a Declaration in Trover brought by an Administrator, because he declares, that whereas he was possessed of divers Goods and Chattels, as of his own proper Goods, and should have said, as was pretended, as of the Goods and Chattels of the Intestate at the Time of his Death; but the Exception was over-ruled by the Court. 1 *Brownl.* 16. See *Latch* 214. *Hudson v. Hudson.* and 263. *S. C.*

Trover *per* Executors for Goods pawn'd by the Testator, and the Tender of the Money by themselves.

An Action of Trover and Conversion was brought for an Hat-band set with Pearls and Diamonds. Upon Not Guilty pleaded, a special Verdict was found; that the Plaintiff was possessed thereof, and pawn'd it to *John Whitlock* for 25 *l.* but no certain Time appointed for the Redemption thereof; that *Whitlock* being sick, his Wife in Presence, and with his Assent, delivered it to the

Defendant, and afterwards he made his ſaid Wife his Executrix, and died, who proved the Will; that the Plaintiff tendered to the ſaid Executrix the ſaid 25 *l.* who refuſed, and afterwards demanded the Hat-band of the Defendant, who refuſed to deliver it, but converted it to his own Uſe; whereupon, *&c.* And in this Caſe, three Points were moved; Firſt, There being no Time appointed for the Redemption, whether it may be made after the Death of him to whom it was pawn'd, or ought to be in the Lives of both the Parties? And as the Juſtices reſolved, It may be well made after the Death of him to whom it was pledged, but not after the Death of him who pledged it. *Yelverton* and *Croke* doubted, and held that it could not; for he at his peril ought to redeem it in his Time, as it is upon a Mortgage. But *Fleming* and the others againſt it; for Pledging doth not make an abſolute Property, but is a Delivery only until he pays, *&c.* ſo it is a Debt due to the one, and a Remainder of the Thing unto the other, for which there may be a Redemand at any Time upon Payment of the Money; for the Pledge delivered is but as Security for the Money lent, ſo as he who borrows the Money is to have his Pledge again when he repays it, and his Tender gives him Intereſt therein; and there is a Difference between a Mortgage of Land and Pledging of Goods, for the Mortgagee hath an abſolute Intereſt in the Land, but the other hath but a ſpecial Property in the Goods, to detain them for his Security. 5 *H.* 7. 1. 9 *Ed.* 4. 25. 36 *Ed.* 3. *Bar.* 188. Secondly, it was reſolved, That by this Delivery of the ſaid Goods

Goods, by the Feme, with the Aſſent of her Baron, to the Defendant, there paſſed no Intereſt of them to the Defendant, but (as it were) a Cuſtody only; and therefore the Tender of the Redemption ought to be made to the Executrix, and not to the Defendant. Thirdly, That when he tendered the Money to the Executrix, and ſhe refuſed, it was as good as Payment, and the ſpecial Property of the Goods is reveſted in the Plaintiff; then when he demanded them of the Defendant, and he refuſed to deliver them, but converted them to his own Uſe, a Trover and Converſion well lies, although he came unto them by a lawful Delivery, and not by Trover; wherefore it was adjudged for the Plaintiff. *Cro.* 244. *Ratcliff v. Davis. S. C. Yelv.* 158. *S. C.* 1 *Bulſt.* 29.

Where Severance lies.

The Plaintiffs brought an Action of Trover and Converſion, as Executors, againſt the Defendant, for an Obligation, and declare it was loſt in the Teſtator's Time, but lay the Converſion ſince his Death. Two of the Debtors were ſever'd, and *non proſ.* entred as to them; to the third, the Defendant pleaded *non Cul.* and found againſt him, and five Hundred Pounds Damages given; and now moved in Arreſt of Judgment upon his Severance; and held by *Hale*, Chief Baron, and the whole Court, That Summons and Severance lies not in this Caſe, becauſe the Converſion, which is the moſt material Part of the Declaration, was in the Executors own Time; ſo that upon the Matter, the Action is grounded on their own Poſſeſſion, as Treſpaſs of their own Poſſeſſion, in which

Case Summons and Severance does not lie, and consequently the Nonsuit of one is the Nonsuit of all; and all the Proceedings after are to no purpose. *Per Hale*, Chief Baron, There are two Sorts of Severances, when the Plaintiff will not appear, there he shall be summoned and severed; the other, when all appear, but some one or more will not prosecute; there he or they shall be severed by order of Court; and Judgment in this Case was arrested. *Hardr.* 317. *Manley & al' versus Lovell.*

Infant-Executor may bring Trover after he gave the Defendant a Release, unless it were made on a Valuable Consideration.

If an Infant-Executor release, yet he may afterwards, notwithstanding such Release, bring an Action of Trover and Conversion if that Release were not made for a valuable Consideration. See 5 *Co.* 27. *Russell ver. Pratt. S. C. Moor*, 146. *S. C.* 1 *And.* 177. *S. C.* 1 *Leon.* 44.

Non Culp. pleaded per Executors, and ill.

An Action on the Case was brought against Executors, and the Plaintiff declared, That he was possessed of divers Goods, that they casually came to their Testator's Hands, who converted them to his own Use, and avers, that the Executors had Assets; they pleaded *Non culp*, and 'twas found for the Plaintiff; and moved in Arrest of Judgment, that *Non culp.* is no Issue, because the Plaintiff in his Declaration had alledged no Offence or Tort in the Executors, but in the Testator for the converting the Goods to his own Use; therefore for the Executors to plead *Non culp.* in whom Tort was supposed, did make no Issue; and for this Cause Judgment was staid. *Savill*, 13.

Frem-

Fremling and his Wife, Executrix of *A. B.* brought an Action of Trover and Converſion againſt *Clutherbook*, for Goods of the Teſtator's found and converted by the Defendant, and obtained a Verdict agninſt him. The Defendant moved in Arreſt of Judgment, and took theſe Exceptions. 1. That the Declaration was of a Joint Poſſeſſion of Goods of the Husband and Wife, and Damages are given to the Husband and Wife, whereas the Goods properly belonged to the Wife only, as the Executrix, and not to the Husband and Wife. 2dly, It doth not ſet forth how the Feme came to the Poſſeſſion of the Goods. But to this *Rolle*, Juſtice, anſwered, That the Poſſeſſion of the Wife, as Executrix, was alſo the Poſſeſſion of her Husband, and that the Damages recovered ſhall go to the Eſtate of the Teſtator, and ſo may concern them both; and for the ſecond Exception, this being a Poſſeſſory Action only, it is not neceſſary to ſhew how the Poſſeſſion of the Goods was gained. Staid till the other ſhould move. *Style* 48. *Fremling* and *Clutherbook*.

In Trover by Wife, Executrix for Goods of the Teſtator's grounded on her own Poſſeſſion, the Huſband may join with her.

And the Damages ſhall go to the Teſt to's Eſtate.

In Poſſeſſory Actions need not ſhew how the Poſſeſſion was gained.

How, and in what Manner this Action may be brought againſt Baron and Feme; there are ſo many Caſes in our Books that contradict one another, that we ſhall leave the Reader to uſe his own Judgment, and here inſert the Caſes or References to all that concern this Point.

Goods came to Feme-covert by Trover, and ſhe and her Husband did convert them to their own Uſe: It was holden *per Curiam*, That the Action upon the Caſe ſhall be brought againſt the Husband and Wife, and not againſt the Husband only; for the A-

That Trover lies againſt Baron and Feme for a Converſion by the Wife.

action doth ſound in Treſpaſs, and it is not like unto Detinue; for upon a Detainer by the Wife, the Action lieth againſt the Huſband only. 1 *Leon.* 312. *Marſhe's* Caſe, *S. P. Owen* 48. *Balwin v. Martin. S. P. Litt. Rep.* 81. *S. P.* adjudged on Writ of Error. *Yelv.* 165. *Draper v. Fulkes. W. Jones* 143. *Hodges v. Sampſon.*

No Action lies againſt Baron and Feme for a Converſion *ad uſum ipſorum.*

Error of a Judgment in the King's Bench, in Action *ſur* Trover and Converſion of Goods, and *inter alia* of 60 *l.* in Money, againſt Baron and Feme, ſuppoſing that they converted them to their proper Uſe; the Defendants pleaded Not guilty, and found againſt them for the 60 *l.* and that they ſhould be *in Miſericordia.* The Error aſſign'd was, Becauſe an Action lies not againſt Baron and Feme for converting Goods to their own Uſes; for 'tis the Converſion of the Baron only, and they are only to his own Uſe: And altho' they may be charged with a Joint Battery or Impriſonment, yet it cannot be ſo for Goods converted; and of that Opinion were all the Juſtices of the Common Bench, and Barons. But it was ſhewn that this Judgment paſſed *ſub ſilentio*, after Verdict, without Exception. For *Paſch.* 19 *Jac.* betwixt *Harriſon* and *Bradford* and his Wife, in Action *ſur* Trover of Goods, and converting them to their Uſe; after Verdict for the Plaintiff it was moved, That the Action lay not, and there it was adjudged for the Defendant. *Hill.* 19 *Jac. Rot.* 921. *Vid.* 13 *R.* 2. *br.* 644. 39 E. 3. 22. And it was moved by *Sherfield*, That the Judgment ſhould be reverſed *quoad* the Feme; *ſed non allocatur*; wherefore it was reverſed. 2 *Cro.* 661. *Berry* and his Wife *ver. Nevys. Pal.* 343. *W. Jo.* 16.

16. 264. *Latch* 126. *Newman v Cheyney. S. C. Noy* 79. *March* 82. 3 *Cro.* 494. *Perry v. Diggs.*

Trover againſt Baron and Feme, and laid *Quod ad uſum proprium converterunt* and it was alledged, *proprium* might be applied only to the Husband; ſo alſo if it had been *ad uſum ſuum.* But the Court held neither had been good; ſo it was prayed, that Judgment might be entred, *Quod quereus nihil capiat per billam*; for if it had been *quod Defendens eat inde ſine Die*, the Plaintiff could not have brought an Action *de novo.* 1 *Ventr.* 33, 24, 12.

How the Entry of a Judgment muſt be, not to bar a new Action

An Action of Trover and Converſion was brought by *Clarke* againſt *Pew* and his Wife, and the Declaration was, That the Goods were found by the Baron and Feme, and were converted *ad uſum ſuum*, whereas it ought to be in the plural Number, to wit, *ad uſum eorum*, or *ad uſum* of *Pew* and his Wife; for as it was, it ſuppoſed the Converſion to be made only by the Husband which is contrary to the Action it ſelf, which is brought againſt both; upon this Judgment was ſtaid till the other ſhould move. *Style* 18. *Clark* and *Pew.*

How the Converſion ſhall be laid where the Action is brought againſt Baron and Feme.

Sur Trover and Converſion of Goods by Baron and Feme, *ad uſum ipſorum*; they pleaded not Guilty, and both were found Guilty, and Damages aſſeſſed; and now moved in Arreſt of Judgment, That the Action lies not againſt the Baron and Feme jointly for Converſion to their Uſes during the Coverture. For when they join, it is the Act of the Baron only, and the Feme cannot convert to her own Uſe; but an Action of Trover well lies for Converſion by the Feme be-

Trover, how and when to be brought againſt Baron and Feme.

forg the Coverture, or by the Feme only during the Coverture, for ſhe may do a Tort ſolely, and the Baron ſhall be ſued with her; but not where ſhe joins with the Baron; wherefore the Court would adviſe thereof. And afterward, *Trin.* 8. *Car.* it was adjudged for the Defendant. 38 *Ed.* 3. 1. 13 *Ric.* 2. *brev.* 644. 3 *Cro.* 254. *Rhemes v. Humphrys & Ux'.*

In Trover againſt Baron and Feme, and a Stranger, the Converſion muſt be laid to be *ad uſum* of the Huſband, and not *ad uſum ipſarum.*

Chaſe brings an Action of Trover and Converſion againſt *Gallop*, and his Wife, and a Stranger, in the Common Pleas, and had a Verdict and a Judgment againſt them; the Defendant brought a Writ of Error to reverſe this Judgment, and aſſign'd for Error, That the Plaintiff declares, that the Goods for which the Action is brought, *venerunt ad uſum ipſorum, viz.* of the Husband and Wife, and the Stranger, which cannot be; for they cannot be ſaid to come to the Uſe of a Feme Covert. *Rolle*, Juſtice, This is not good, for he ought not to declare, that the Goods came to the Uſe of the Feme, but to the Uſe of the Husband only; and therefore *reverſetur Judicium niſi. Style* 115. *Gallop* againſt *Simpſon*, and *poſt* 126. in the ſame Book it appears that Judgment was abſolutely reverſed for this Cauſe.

Trover by Baron and Feme *ad dampnum* of both, naught after Verdict.

Trover by Baron and Feme; and the Plaintiffs declare, *Quod cum Poſſeſſionat. fuerunt, &c.* the Defendant converted *ad dampnum ipſorum*; held naught after Verdict; for the Poſſeſſion of the Wife is the Poſſeſſion of the Husband, and ſo is the Property; ſo that the Converſion cannot not be to the Damage of the Wife, but of the Husband only. 1 *Salk.* 114. *Nelthorp & Ux. verſus Anderſon.*

In

In an Action of Trover and Conversion it was moved in Arrest of Judgment, That the Action was brought by Baron and Feme, and the Trover supposed to be before, and the Conversion subsequent to the Coverture, and therefore it ought to be brought by the Baron alone; for if a Feme loses Goods, and after marry, the Husband dies, his Executor shall have the Goods, because the Property was in him by the Marriage, notwithstanding the Loss: And of this Opinion was *Hyde*, Chief Justice, and *Kelynge*; and they also held, That the Conversion is the Cause of the Action, and that being subsequent to the Marriage, the Husband ought therefore to bring the Action alone. But Judge *Twisden* and *Wyndham* were of Opinion the Action was well brought; and they distinguished between Actions which affirm the Property, as Replevins and Detinues, which they therefore held ought to be brought only in the Husband's Name, and Actions which disaffirm the Property, as Trespass and Trover, which being founded on a Tort, antecedent to the Coverture, ought therefore to be brought in both their Names. 2 *Sid.* 172. *Powes & Ux' v. Marshall.*

Trover, how to be brought where the Trover was antecedent and the Conversion subsequent to the Coverture.

In Error of a Judgment in the King's Bench, in an Action of Trover against Baron and Feme, because the Feme after Coverture, found Goods, and converted them to her Use; they pleaded *Quod ipsi non sunt Culpabiles.* And for this Cause it was ruled to be ill; for that no Tort is supposed in the Baron, and so they ought to have pleaded *Quod ipsa non est inde Culpabilis.* Wherefore, after Verdict for the Plaintiff, a Repleader was awarded, whereupon they repleaded and tra-

Baron and Feme, when to plead *quod ipsa*, when *ipsi non*, &c.

traverſed the Converſion, and it was found for the Plaintiff, and Judgment accordingly; and Error aſſigned, that the firſt Iſſue was well joined, and there ought not to have been a Repleader; *ſed non allocatur*; for the Tort being alledged to be in the Feme and none in the Baron, the Iſſue ſhall be only that ſhe is not Guilty; and ſo the Prothonotaries of the Common Bench certified to be their Courſe. Another Error was aſſigned to be *ore tenus*, That the Judgment to replead was not good; for it is, *Quia videtur Curiæ quod placitum prædictum, & exitus ſuperinde junctus, eſt minus ſufficiens in lege, ideo dictum eſt partibus quod replacitent*; which is not any Judgment, for it ought to have been *Ideo Conſideratum eſt, &c. ſed non allocatur.* For it is a ſufficient Award to replead, and the Courſe is ſo altogether; wherefore Rule was given to affirm Judgment. But it was afterwards informed to the Juſtices and Barons, That there was not any Bail entred for the Feme, and the Action was principally againſt her, wherefore the Judgment was erroneous, and a *Certiorari* prayed to certify it; but it was moved, That in regard he had aſſigned his Errors, and had not aſſigned that for Error, and the Defendant had pleaded *In nullo eſt Erratum*, and the Record is examined; he may not now alledge it, for then it would be infinite; eſpecially to reverſe a Record in Affirmance of a Judgment they may award a *Certiorari ex Officio*, upon Suggeſtion that there is Dimunition. But the Juſtices held, That altho' the Party, after *In nullo eſt erratum* pleaded, is not receivable to alledge ſuch a thing for Error, which did not appear in the Record certified; yet to inform the Court, he

may move them, and they, *ex Officio*, may award ſuch a *Certiorari*, if they will; whereupon they awarded a *Certiorari*, and the Bail certified to be well entred; and the Judgment was affirmed. 2 *Cro.* 5. *Cox v. Cropwell. S. C.* 1 *Cro.* 113. *S. C. Noy* 41.

Whether the Feme muſt demand Goods loſt *dum ſola.*

In Arreſt of Judgment upon a Verdict found for the Plaintiff, in a Trover and Converſion, brought by Baron and Feme, for Goods of the Feme, *dum ipſa ſola fuit.* The Exception was, That it is not expreſſed that the Goods were demanded by the Feme. *Rolle*, Chief Juſtice, ſaid, The Demand of the Feme is good to found the Action; and it was then alſo ſaid, That a Trover and Converſion lies for Goods found and converted, altho' they came afterwards to the Hands of the Party that loſt them; the Rule was *Judicium niſi.* *Style* 261. *Gowr* againſt ——

Trover lies tho' the Goods afterwards come to the Owner's Hands.

Judgment *verſus* Baron and Feme, how to be.

In Error of a Judgment in *Norwich*, in an Action of Trover of Goods againſt *Wood*, and *Anne* his Wife, of the Trover and Converſion of the Feme during the Coverture: The Defendants pleaded Not Guilty, and found againſt them for Part, and for the other Part it was found for the Defendant, and the Judgment was *Quod querens recuperet* his Damage found; and that the Defendant, *Anne ſit in Miſericordia*; and that the Plaintiff *pro falſe clamore quoad reſiduum unde Defendentes acquietati exiſtunt, ſit in Miſericordia*: The Errors aſſigned, Firſt, becauſe the Judgment is, That the Feme *ſit in Miſericordia*, whereas it ought to be, that the Baron and Feme *ſint in Miſericordia*; for ſhe cannot pay it without her Husband: Alſo, becauſe the Baron pleads with the Feme, and doth not confeſs the Action, for that is the Cauſe of the *Miſericordia*;

ſericordiâ; alſo the uſual Courſe is in Actions againſt Baron and Feme for Treſpaſs done by the Feme during the Coverture, if they thereof are convicted, to have Jugdment *Ideo Capiantur*, againſt both; yet there was no Offence by the Baron himſelf; and all the Clerks affirmed, That ſo was their Courſe. Another Error was aſſigned, becauſe the Judgment is not *Quod Defendens eat ſine die*; and for both Cauſes it was held to be erroneous, but principally for the firſt; wherefore Judgment was reverſed. 2 *Cro.* 439. *Wood & Ux' ver.* Dr. *Suckling*. *S. C.* 1 *Roll. Rep.* 293. *S. C.* 3 *Bulſt.* 150.

Whether Trover lies againſt one of the Proprietors of a Ship, for Goodsdamnified, without any actual Contract or Neglect in the Defendant?

The Plaintiff declared, That the Defendant, and ſeveral other Perſons, were Proprietors of a Veſſel, in which they uſed to carry Goods for a reaſonable Hire from Port to Port; that he had loaded the ſaid Veſſel with Boards, which were agreed to be ſafely tranſported from *London* to *Topſham*, and that the Defendant ſuffered them to be damnified; and upon Not Guilty pleaded, a ſpecial Verdict was found, the Subſtance whereof was, *viz*;

That the Plaintiff did load the Ship with Boards, of which Ship the Defendant, and ſeven other Perſons, were Proprietors; that the ſaid Ship did uſually carry Goods for Hire; that the Plaintiff delivered the Goods to *Daniel Hull*, who was Maſter of the ſaid Veſſel, and that they were loaded therein, but that none of the Proprietors were preſent.

That there was no actual Contract between the Plaintiff and the Proprietors, or any Negligence in them; but the Boards were damnified by the Neglect of the ſaid Maſter, *&c.*

The

The Queſtions on this Special Verdict were two.

1. Whether this Action will lie againſt the Defendant alone, as one of the Proprietors? or, Whether it muſt be brought againſt them all?

2. If the Action ought to be brought againſt them all, then Not Guilty was not a proper Plea; becauſe the Defendant ought to have pleaded in Abatement, that the reſt of the Owners *ſuper ſe ſuſceperunt ſimul cum* the Defendant, *abſque hoc quod* he *ſuper ſe ſuſcepit tantum.*

It was argued for the Plaintiff, That the Action may be well brought againſt any ſingle Perſon of the Proprietors, becauſe it was grounded upon a Tort, as well as upon a Contract, which in this Caſe is only an Inducement to the Action, and therefore the Plaintiff hath Liberty to bring it either the one way or the other; for 'tis both joint and ſeveral.

So it is in Trover, where a Man declares, That he was poſſeſſed of ſuch Goods, that the Defendant found them, and promiſed to deliver them, but converted them to his own Uſe; the Contract is but Inducement, for the Cauſe of Action ariſes upon the Converſion.

This is a Remedy given by the Conſtruction of the Law; and if ſo, it muſt be certain and effectual to all Intents; and therefore it hath been ruled in an Action brought againſt a common Carrier upon the *Aſſumpſit* in Law, and likewiſe upon the Tort, that the Declaration was ill; and tho' the Plaintiff

had a Verdict, yet the Judgment was arrested, because he had declared both ways.

Agreeable to this was that Judgment which was given upon the Statute of 2 *Ed.* 6. for not setting out of Tithes, in an Action of Debt brought against two Tenants in Common; it happened that one of them set out Tithes, and the other carried them away; and because the Action was brought against both, it was held to be ill; for it lies only against him which did the Wrong.

2. If the Action ought to be brought against all, then the Defendant should have taken the Advantage of it by Pleading, and to have shewed who were the Proprietors with himself; for it is impossible for the Plaintiff to know who they are; and for this Reason the Plea is not good.

Econtra. The Plaintiff ought to have brought his Action either against the Master alone, or all the Proprietors: 'Tis true, If this had been an Action of a simple Trespass, he might have brought it against all or one; but this sounds not only in a Wrong, but 'tis a Breach of a Covenant or Duty, and so ought to be commenced against all of them, as common Carriers.

Now the great Reason why all are liable to an Action is, because they all have a Reward for the Hire of the Vessel; and it seems very unreasonable, that one should bear the Burthen, and the rest run away with the Profit.

The principal Case in *Hutton* is an Authority directly to this Purpose, though it was otherwise quoted by the Plaintiff's Counsel; it was Debt upon the Statute of *Ed.* 6. brought against

againſt one Leſſee for not ſetting out of Tithes, and it appeared, upon Evidence, that two were jointly poſſeſſed of the Term; and for that Reaſon it was held, That the Action would not lie againſt one alone.

2. The Defendant ought not to have pleaded in Abatement, that the reſt of the Proprietors *ſuper ſe ſuſceperunt ſimul cum* the Defendant, *&c.* becauſe ſuch a Plea would not have been good here; for he ſhall never be compelled to plead in Abatement, either in Debt or Contract, but in one ſingle Caſe; and that is where two are bound jointly, and one is ſued, he may plead in Abatement, but cannot ſay, *Non eſt factum*; for the Bond is his Deed, ſince each of them have ſealed it.

Afterwards, in *Hillary*-Term, the Defendant had Judgment, That the Actions ought to be brought againſt all the Part-Owners, becauſe they have all equal Benefit, and the Ground of the Action is upon a Truſt repoſed in all, and every Truſt ſuppoſeth a Contract; and in all Caſes grounded upon Contracts, the Parties who are privy, muſt be joined in the Action.

The Maſter of the Ship is no more than a Servant to the Owners, he hath no Property, either General or Special, but the Power he hath is given by the Common Law.

There are many Caſes where the Act of the Servant ſhall charge the Maſter; as for Inſtance, *viz.*;

King *Ed.* 6. ſold a Quantity of Lead to *Renagre*, and appointed the Lord *North*, who was then Chancellor of his Court of Augmentations, to take Bond for Payment of the Money.

The

The Lord *North* appointed one *Benger*, who was his Clerk, to take the Bond, which was done; who delivered it to the Lord, and he delivered it back again to his Clerk, in order to send it to the Clerk of the Court of Augmentations.

Benger suppressed this Bond; and it was the Opinion of all the Judges of *England*, That the Lord *North* was chargeable to the King; because the Possession of the Bond by his Servant, and by his Order, was his own Possession.

So where an Officer of the Customs made a Deputy, who concealed the Duties, and the Master being ignorant of the Concealment, certified the Customs of that Part of the Revenue into the Exchequer, upon Oath, he was adjudged to be answerable for this Concealment of his Servant.

So where the Lessor was bound that the Lessee should quietly enjoy; and it was found that his Servant, by his Command, and he being present, enter'd; this was held to be a Breach of the Condition, for the Master was the principal Trespasser.

Therefore, though the Neglect in this Case was in the Servant, the Action may be brought against all the Owners; for it is grounded *quasi ex contractu*, although there was no actual Agreement between the Plaintiff and them.

And as to this Purpose, 'Tis like the Case where a Sheriff levies Goods upon an Execution, which were rescued out of the Hands of his Bailiff; this appearing upon the Return, an Action of Debt will lie against him, tho' there was no actual Contract between the Plaintiff and him; for he having

having taken the Goods in Execution, there is *quaſi* a Contract in Law to anſwer them to the Plaintiff.

2. As to the ſecond Point, it was ruled, That Not Guilty was a good Plea to any Miſfeaſance whatſoever; and that a Plea in Abatement, *viz.* That the reſt of the Owners *ſuper ſe ſuſceperunt ſimul cum defendente abſque hoc quod defendens ſuper ſe ſuſcepit tantum*, had been no more than the General Iſſue; but he hath not pleaded thus.

Juſtice *Dolben* agreed, That the Action ought to be brought againſt all the Proprietors, it being upon a Promiſe created by Law; but he was of Opinion, that this Matter ought to have been pleaded in Abatement. 3 *Mod.* 321. *Boſon ver. Sandford.* *S. C. Show.* 29.

In Trover and Converſion by two; after Verdict for the Plaintiffs, 'twas moved in Arreſt of Judgment, that one of the Plaintiffs was dead; yet the Court gave Judgment. 2 *Bulſt.* 262. *Spring & al' v. Barrett.*

In Trover for a Ship and divers Goods, the Defendant pleaded in Bar, That the Plaintiff, and *N.* and *P.* were joint Merchants, and jointly poſſeſſed of the Ship and Goods; that they were dead, and had made Executors, who adminiſtred, to which the Plaintiff demurred, and had Judgment; becauſe even admitting the Plea to be true, yet it is at moſt but a Plea in Abatement. 3 *Lev.* 290. *Kemp v. Andrews.* *S. C. Show.* 188.

In Trover by one Jointenant, Jointenancy may be pleaded in Bar.

Trover and Converſion was brought againſt *A.* and *B.* *A.* pleaded Not Guilty; and that Iſſue is found againſt *A.* and *B.* pleads, and traverſes *abſque hoc* that he and *A.* converted, *&c.* and that Iſſue is found for *B.* againſt

Judgment to one Defendant and for the other.

the Plaintiff; yet it ſeemed to the Court that the Plaintiff ſhall have Judgment againſt *A.* upon the firſt Verdict; for although that the Declaration be, that they converted, *&c.* yet that ſhall be intended jointly and ſeverally: And ſo the Opinion of the Court was againſt *A. Noy* 144. *Peter Gee* againſt *Peter Long.*

Aſſignee has Property by relation from the Time of the Bankrupcy, ſo as to avoid all Mean Acts.

Aſſignee of Commiſſioners of Bankrupcy brought Trover on their own Poſſeſſion, *ut de bonis ſuis propriis*; and that they came to the Hands of the Defendant, and he converted them: And upon Evidence it appeared the Converſion was by executing a *Fieri Facias* on the Goods in the Declaration, after the Bankrupcy, and before the Aſſignment, and it was not proved that the Plaintiff had demanded; and this being made a Caſe, it was argued, That by Aſſignment the Aſſignee had a Property, by relation, from the very Time of the Bankrupcy, and there was no mean Interval of Time; as where one takes out Letters of Adminiſtration, he hath a Property from the Death of the Inteſtate, and may declare generally *ut de bonis ſuis propriis*, even before an Adminiſtration is ſued out. But *Holt* denied this, and ſaid, He ought to declare ſpecially, and ſo the Plaintiff might have done in the principal Caſe; and he relied upon the Caſe of *Perry* and *Bower*, and ſaid the Aſſignee was in by Relation from the Time of the Bankrupcy, ſo as to avoid all meſne Acts, but not ſo as to be actually inveſted with the very Property. *Adjournat'.* 1 *Salk.* 111. *Kiggil ver. Player.*

If

If after Execution by *Fieri Facias* is executed, and before the Goods are sold, any Person takes them away and converts them to his own Use, the Sheriff may bring Trover and Conversion for them. See 2 *Saund.* 47. *Wilbraham v. Snow.* S. C. 2 *Sid.* 447. S. C. 1 *Mod.* 45.

Sheriff may maintain Trover for Goods he had seized by Vertue of a *Fieri Facias.*

In an Action of Trover and Conversion of Beans against *Darson*, and coming to Trial at the Assizes upon Not Guilty, because it was a small Cause, the Judge took not the Jury, but directed to move the Court, and so it was; and the Case was, That the Land whereupon the Beans grew, was a Lunatick's, and Copyhold, and the Lord had granted unto one the Custody of the Land, by whose Leave and Assent the Plaintiff did sow the Land; and the Court was of Opinion, That the Actions was to be brought in the Name of the Lunatick; for there was no Interest gained in his Land by this Committment: And *Hobart* did not agree that the Lord hath Power over the Lunatick's Land without a Custom; for the Imitation of the King's Power over Freeholds makes not Consequence; for tho' the Statute be but an Affirmance of the Common Law, in the Case of the King, yet the collateral Incidents of Estates, as Dower, Tenancy by the Curtesy, Wardships, and the like, are not without special Custom. *Hob.* 215. *Cocks ver. Darson.* S. C. *Noy.* 27.

Action brought for taking Things growing on a Lunatick's Copyhold-Land to be brought in the Lunatick's, not in the Committee's Name

CHAP. III.

For what Things, and in what Cases, an Action of Trover and Converſion lies.

Trover does not lie for Goods damnified by negligent keeping, if they really came to the Defendant's Hands by Trover.

AN Action upon the Caſe was brought upon a Trover and Converſion of twenty Barrels of Butter, and declared, That by negligent keeping of them, they were become of little Value; upon which there was a Demurrer in Law: And by the Opinion of the whole Court upon this Matter, no Action lieth; for a Man who comes to Goods by Trover, is not bound to keep them ſafely, as he who comes to them by Bailment. *Walmeſley*, If an Man find my Garments, and ſuffereth them to be eaten with Moths by the negligent keeping of them, no Action lieth: But if he wear my Garments, it is otherwiſe; for the wearing is a Converſion. 1 *Leon.* 224. *Walgrave* againſt *Ogden*. *S. C. Owen* 141. *S. C.* 1 *Cro.* 229.

Yet it lies if Goods bail'd are damnified by the Bailee's Fault.

If one deliver Goods to another to be kept ſafely, whether for Hire or not, and the Party undertake to do it; if by his Default they are damnified, Caſe or Detinue will lie; but if the Party bring Detinue, he ſhall recover the Goods in ſuch Plight and Condition as they are in, and it ſhall be adjudged the Folly of the Plaintiff to bring an Action which is no adequate Remedy, when he might have had one that was; but if the Party ſell the Goods, then the Bailor ſhall have an Action of Detinue, not one of Trover, according to the Opinion of ſome; but ac-

according to the Opinion of others, (and ſo the Law is now underſtood) the Party hath his Election, and may bring either; for the ſelling the Goods is a Miſdemeanor, which is ever a good Cauſe to bring an Action on the Caſe. See *Keil.* 160. See 4 *Leon.* 189.

Or if ſold by him.

Trover for ſeveral Things, and among the reſt *de uno Æthiope, vocat.* a Negro; and on Not Guilty pleaded, Verdict was for the Plaintiff, and ſeveral Damages, and as to the Negro, 30 *l.* And it was moved in Arreſt of Judgment, That Trover lay not for a Negro, for that the Owner had not an abſolute Property in him; he could not kill him as he could an Ox. *Contra.* It was ſaid the Property implies the Right of having and enjoying, and diſpoſing; but it does not always imply a Power to deſtroy: That this Power holds in Beaſts, Fowl and Fiſh, which were made the Property of Mankind by the Act of God, and have a natural Exiſtence; but not in Things incorporeal, which conſiſts *in Jure tantum*; for this being a Property *ex inſtituto* only, the Owner has only a Power according to the Meaſure of his inſtituted Right: And it was inſtanced in the Caſe of Common, a Way and a Ward. On a *Ca. Sa.* the Plaintiff has an Intereſt in the Body of the Priſoner as a Pledge, not to ſell, but to keep, and it goes to Executors. *Hob.* 61. In a Servant, to work him; in a Captive, to ſell him. *Reg.* 102. *F. N. B.* 18. *a. B. N. C.* 295. *Bro. Property,* 38. 1 *H.* 6. *ch.* 5. in *Raſt.* 219. *Cot. Ab.* 460. That the Writ *de Nativo habendo* muſt lay the Explees of a Villein in working and taxing him at Will. *Co. Ent.* 406. That by the Law of *Moſes* a Man may be a Slave; and a Slave was a Chattel, his Maſter's Money,

Trover lies not for a Negro, but in Treſpaſs *quare captivum ſuum cepit*; Plaintiff may give in Evidence, that he was his Negro.

Difference between Property in Things having a Natural Exiſtence, and a Civil Exiſtence, only.

Servus prædicatis & perſonalis.

Exod. xx. 21. That by the ſame Reaſon there may be a *Servus prædialis*, *i. e.* a Villein, one may be a *Servus perſonalis*; and that firſt a Captive and afterwards a Villein. *Hob.* 27. *Brownl.* 78. A Villein in Groſs is a Chattel, for he is of a periſhable Nature, and cannot endure for ever. So is *Fitz. Diſcontinuance*, 16. *Br. Villein*, 60. As Villeins are regardant to Land, it is a different Thing; and in that Reſpect they are Inheritances, and ſo are the Charters. Every Villein is intended in Law regardant; the Writ in the Regiſter therefore ſuppoſes him to be *Nativum ſuum*, but before he was a Villein, he was a Captive, and then a Chattel: Laſtly it was inſiſted, That the Court ought to take Notice that they were Merchandize, and cited, 2 *Cro.* 262, The Caſe of Monkeys. 2 *Lev.* 201. 3 *Keb.* 785. 1 *Inſt.* 112. If I impriſon my Negro, a *Habeas Corpus* will not lie to deliver him; for by *Magna Charta* he muſt be *liber homo*. 2 *Inſt.* 45. *Sed Curia contra*; Men may be the Owners, and therefore cannot be the Subject of Property. Villeinage aroſe from Captivity, and a Man may have Treſpaſs *quare captivum ſuum cepit*, but cannot have Trover *de Gallico ſuo*; and the Court ſeemed to think that in Treſpaſs *quare captivum ſuum cepit*, the Plaintiff might give in Evidence, that the Party was his Negro, and he bought him. 2 *Salk.* 666. *Smith v. Gould* See 2 *Lev.* 201. *Butts ver. Penny.* 3 *Lev.* 337. *Chambers ver. Warkhouſe.*

Trover lies for the Converſion after Redelivery.

Per Popham. If a Man find my Horſe, and after ride him, and then delivers him unto me, and I bring an Action of Trover for the Converſion, it is no Plea, that you have deliver'd

the

the Horse to me before the Action brought; for you ought to answer to the Conversion. *Goldſ.* 155.

Trover lies for Money out of a Bag.

It was ruled by *Rolle*, That a Trover would lie for Money, which was delivered by the Plaintiff himself to the Defendant to keep, tho' not in Bags. Both which Points, he said, had been doubted and resolved. *Aleyn* 91. *Davis v. Dyos.* See *Moore* 841. *Isaack v. Clerk S. C.* 2 *Bulſt.* 307. *S. C.* 1 *Roll.* 59, and 126.

An Action of Trover lies for Musk-Cats and Monkeys.

An Action of Trover and Conversion, of 100 Musk-Cats, and 60 Monkeys; the Defendant pleads Not Guilty, and found against him: And it was moved in Arrest of Judgment, That an Action lay not, because he doth not shew, that they were tame or reclaimed; as, 12 *H.* 8. and 14 *Eliz. Dyer* for a Hawk; *sed non allocatur*; for they be Merchandize, and valuable; and so it is of an Action for a Parrat. Wherefore it was adjudged for the Plaintiff. 2 *Cro.* 262. *Grymes v. Sback.*

Trover does not lie for Money received by the Servant.

In Trover and Conversion of 25 *l.* the Defendant pleaded not Guilty; and the Jury found a Special Verdict, That the Defendant being Servant and Factor to the Plaintiff, sold twenty Quarters of his Master's Corn for 25 *l.* and receiving it, converted it to his own Use. *Stephens* moved for the Defendant, That this Verdict is found for him; for this 25 *l.* was never in his Master's Possession, nor his Money, and this Action lay not, but rather an Account. This also is Money out of any Bag; wherefore, *&c.* But *Fenner* held, That 'tis found for the Plaintiff; for the Possession of the Servant is the Master's Possession, and it is as if he always had it in his Possession. And it hath

been adjudged, That the Servant being robbed, the Maſter may well bring the Action; and that was the Lord *Rich*'s Caſe. *Clinch* doubted. Afterwards this Caſe being moved again, the Plaintiff had Judgment, but that Judgment on a Writ of Error, was reverſed; and why. becauſe Money being a thing that cannot be known, the Property was in the Servant, and it appears by the Writ that the Property of the Money is in the Receiver; ſo 'tis in Caſe of Bailment of Things that are undiſtinguiſhable, the Property of them is in the Bailee. 1 *Cro.* 638, 661, 746. *Holyday v. Hicks.*

Trover lies *ver.* Bailee for Things he expreſly promiſed to deliver.

In an Action upon the Caſe *ſur* Trover and Converſion, grounded upon a Deceit, the Caſe appeared to be this; That where there was *A. B.* and *C. A.* was indebted to *C.* in ſuch a Sum of Money, and *B.* in ſuch a Sum of Money was indebted to *A.* It was agreed between *A. B.* and *C.* that *B.* in Diſcharge of his Debt unto *A.* ſhould diſcharge the Debt of *A.* unto *C.* in paying and delivering unto him certain Commodities, which he had in his Hands and Poſſeſſion, being properly the Goods and Commodities of *A.* and which *B.* by and with Conſent of *A.* did aſſume, promiſe, and undertake to deliver unto *C.* in Diſcharge of the Debt of *A.* unto him, and *C.* was contented to accept thereof. According to this Agreement made between them, *B.* did not according to his Promiſe or Undertaking, diſcharge the Debt of *A.* unto *C.* by Delivery of the Goods unto him, but contrariwiſe did convert them unto his own Uſe, after the Death of *A.* and for this *C.* brought his Action on the Caſe for a Trover and Converſion, grounded upon this Deceit; and whether this lieth or not, is the Queſtion.

Curia.

Curia. The whole Court agreed clearly in this, That the Action is well maintainable; for if a Man bail Goods to one, for to bail them over to another, if he to whom this Bailment was thus made to bail them over, contrary to the Truſt in him repoſed, doth not deliver them over, as he was to have done, but doth convert them to his own Uſe, he has by this his Deceit, made himſelf liable to an Action, both of the firſt Bailor, and alſo of the Party to whom they were to have been bailed over, and either of them may well have his Action againſt him for this. And notwithſtanding the third Perſon here, to whom the Goods ought to have been bailed, had never the Poſſeſſion of them; yet this Converſion and Non-feaſance of that which he ought to have done, is a Wrong, and very prejudicial to *C.* the third Perſon. And for this Wrong, and Prejudice, he may have his Action on the Caſe, as well as the firſt Bailor. But both of them ſhall not have their Actions, but he that firſt begins his Action, ſhall go on with the ſame. *Curia.* The whole Court alſo agreed clearly in this, That this not bailing over, and Delivery of the Goods by *B.* the firſt Bailee, unto *C.* in Satisfaction of the Debt of *A.* and according to the Agreement made between *A.* and *B.* that this doth clearly in Law amount to make a Converſion; and that by this he has made himſelf ſubject and liable to an Action to be brought by the Party to whom he ſhould have delivered. *Williams,* Juſtice, If a Man deliver a Deed to one, to deliver the ſame over to another, and he doth not deliver the ſame over accordingly, the Party to whom the Deed was to have been delivered, may well have his Action for this

not

not Delivery of the Deed unto him; and with this agrees the Case in 28 *H.* 8. *Dyer fol.* 20, 21. *Pla.* 125, 228. in the Grocers Case of *London:* By *Mountague* there: If a Man deliver Money to bail this over, if the Bailee doth not perform the Condition, he is by this a Debtor of the Money, or accountable at the Pleasure of the Bailor. And there *Pla.* 128. In every Receipt two Things are included; (*viz.*) Either the Receipt is to the Use of the Bailor, or to the Use of a Stranger, or to his own Use; if the same be to the Use of a Stranger, then he is his Debtor; because that the Property is not in the Bailee. *Curia.* The whole Court agreed in this, That the Action brought by the Plaintiff against the Defendant, being the first Bailee, for not bailing of the Goods according to the Agreement, was well brought, and that here was a good Conversion in Law; and so by the Rule of Court, Judgment was given for the Plaintiff. 1 *Bulst.* 68. *Flewellin*, and others, against *Rave.*

In a Special Verdict in Trover and Conversion, the Case was this; *viz.*

If *A*'s Servant has the Possession of Goods of another who demands them, yet no Action lies against the Servant, for he had them *in auter droit.*

H. being possessed of several Sheep, sells them in a Market to *Alstone*, but did not deliver them to the Vendee; and afterwards, in that very Market, they discharged each other of this Contract, and a new Agreement was made between them, which was, That *Alstone* should drive the Sheep home, and depasture them till such a Time, and that at the end of that Time, *H.* would pay him so much a Week for their Pasture; and if at the End of that Time (then agreed between them) *Alstone* would pay *H.* so much for his Sheep (being a Price also agreed on) that then *Alstone* should have them.

Before

Before the Time was expired, *H.* sells the Sheep to the Plaintiff, *Mires*, and afterwards *Alstone* sells them to one *Marwood*, who brought a Replevin against the Plaintiff for taking the Sheep; and the Officers, together with *Solebay* the Defendant (who was Servant to *Marwood*) did by his Order, and in Assistance of the Officers, drive the Sheep to *Marwood*'s Grounds, where they left them.

The Plaintiff demands the Sheep of *Solebay*, and upon his Refusal to deliver them, brings this Action against the Servant; and Whether it would lie or not? was the Question. It was argued at the Bar, That the Action would not lie against the Defendant, because he had not the Possession of the Goods at the Time of the Action brought; for he presently put them into his Master's Ground: And it was said, If *A.* find Goods, and *S.* takes them away before the Action brought, Trover will not lie against *A.* but it is otherwise, if he sells them.

In this Case it would have been a Breach of Trust in the Servant to have delivered the Goods belonging to his Master, to another: 'Tis true, if there be a Conversion, tho' the Possession be removed before the Action brought, yet the Action will lie; but that is because of the Conversion.

Many Cases were put where the Servant is not liable to an Action for any thing done by the Command of his Master; and where a Bailiff, who is but a Servant to the Sheriff, shall not be charged in a False Return made by his Master. *Cro. Eliz.* 181. So if a Smith's Man prick an Horse, the Action lies against

againſt the Maſter, and not againſt the Servant.

The Court, before they delivered any Judgment in this Caſe, premiſed theſe two Things; *viz.*

1. That 'tis neceſſary in Trover to prove a Property in the Plaintiff, and a Trover and Converſion in the Defendant. And it was ſaid by Juſtice *Atkyns* (but denied by the Chief Juſtice) that tho' Goods are ſold in a Market, yet the Property is not changed till the Delivery; for which he cited *Keilw.* 59, 77.

But the Court held clearly in this Caſe, That the firſt Sale to *Alſtone* was defeated by the Agreement of the Parties afterwards; for when a Bargain is made, and all the Parties conſent to diſſolve it, and other Conditions are propoſed, the new Agreement deſtroys the former Bargain. And the Chief Juſtice ſaid, That if an Horſe was bought in a Market, for which the Vendee is to pay ten Pounds, if the ready Money be not paid, the Property is not altered, but the Party may ſell him to another.

2. This new Agreement, to have the Sheep, if *Alſtone* would pay ſuch a Sum of Money at a future Day, will not amount to a Sale, and the Property is changed; and conſequently the Sale by *H.* to the Plaintiff, before the Day, is good; and ſo the Property is in him. But by the Opinion of the whole Court, the Action would not lie againſt the Defendant.

1. The Defendant could not be guilty of a Converſion, unleſs the driving of the Cattle by Vertue of the Replevin would make him guilty; but at that Time the Sheep were

in Cuſtodia Legis, and the Law did then preſerve them, ſo that no Property can be changed; and if ſo, then there could be no Converſion.

2. The Action will not lie againſt the Servant; for it being in Obedience to his Maſter's Command, tho' he had no Title, yet he ſhall not be excuſed: And this Rule, Juſtice *Scroggs* ſaid, would extend to all Caſes where the Maſter's Command was not to do an apparent Wrong; for if the Maſter's Caſe depended upon a Title, be it true or not, 'tis enough to excuſe the Servant; for otherwiſe it would be a miſchievous Thing, if the Servant upon all Occaſions muſt be ſatisfied with his Maſter's Title and Right before he obey his Maſter's Commands; and it is very requiſite that he ſhould be ſatisfied if an Action ſhould lie againſt him for what he doth in Obedience to his Maſter: But it was ſaid, the Servant cannot plead the Command of his Maſter in Bar of a Treſpaſs; and it was likewiſe ſaid, That in this Caſe, the driving of the Cattle to the Grounds of his Maſter, or a Stranger helping to drive them without being requeſted, is juſtifiable.

3. Becauſe what was done by the Defendant was done in Execution of the Proceſs of the Law, and he might as well juſtify as the Officer; for if he forbid the Defendant to have aſſiſted him, yet his aſſiſting him afterwards would not have made him Guilty, becauſe done in Execution of Law.

4. Becauſe it is not found that the Servant did convert the Sheep to his own Uſe; for the Special Verdict only finds the Demand and the Refuſal, which is no Converſion; and tho' 'tis an Evidence of it to a Jury, yet

yet 'tis not Matter upon which the Court can give Judgment of a Converſion. 10 Co. 57.

And therefore the Jury ſhould have found the Converſion as well as the Demand and the Refuſal, like the Caſe in 2 *Roll. Abr.* 693. in an Aſſiſe of Rent-Seck; upon *Nul Tort* pleaded, the Jury found a Demand and Refuſal, *& ſic diſſeiſivit*; it was held to be a good Verdict; for the Demand ought to have been found on the Land, and ſhall not be ſo intended unleſs found.

The Plaintiff here hath ſet forth in his Declaration a Requeſt to deliver; then a Refuſal and Converſion too, which ſhews that they ought to be found, becauſe diſtinct Things; and the finding the Demand and Refuſal was only a preſumptive, not a concluſive, Proof of the Converſion; and if the Jury themſelves knew that there was no Converſion, yet the Plaintiff hath failed in his Action; as if a Trover be brought for cutting Trees, and carrying them away, and the Jury know that the Defendant cut them down, yet they ſtill lay in the Plaintiff's Cloſe; this is no Converſion.

And though it hath been ſtrongly inſiſted at the Bar, That the Court ſhall intend a Converſion, unleſs the contrary appeared, and are to direct the Jury to find the Demand and Refuſal to be a Converſion; and the Opinion of *Dodridge* and *Croke*, in *Roll. Rep.* 60. was much relied on, where *Adams* recovered againſt *Lewis* 40 *l.* in the Court of *Exon*, and three Buts of Sack were taken in Execution, and the Plaintiff depoſited 22 *l.* in the Hands of the Defendant to prevent the Sale of the Sack, which was to be a Pledge

to

to return it upon upon Requeſt, if the Defendant was not paid before the next Court-Day; the Jury found the Debt was not paid, and that no Requeſt was made to return the Sack, but that the Plaintiff requeſted the Defendant to return the Money: Yet it was held by thoſe two Juſtices, That the Law would ſupply the Proof of a Converſion, tho' it was not found; for it ſhall be preſum'd that the Money was denied to the Plaintiff, and that the Denfendant might uſe it himſelf; and becauſe no other Proof could be made, that very Denial ſhall be a Converſion in Law; ſo a Denial of a Rent-Seck after Demand, is a Diſſeiſin; much more in Perſonal Actions, where the Subſtance is found, 'tis well enough. 1 *Inſt.* 282. *a.*

But the Court ſaid, That notwithſtanding this Authority, they would not intend a Converſion, unleſs the Jury had found it ſpecially in this Caſe, becauſe they ought to have found it to make the Servant liable; for if the Converſion was to the Uſe of the Maſter, there is no Colour for this Action to be brought againſt the Defendant, but it ought to be brought againſt the Maſter.

Whereupon a *Venire Facias de novo* was prayed, to help the Inſufficiency of the Verdict, the Converſion not being found; but the Court ſaid, It was to no purpoſe to grant a new Trial, unleſs the Plaintiff had a new Caſe; and ſo Judgment was given for the Defendant. 2 *Mod.* 242. *Mires verſus Solebay.*

Trover lies to try the Validity of a Sale.

In Trover and Converſion of divers Quarters of Malt, the Caſe upon the Evidence was, That the Defendant having great Quantity of Malt in a Veſſel, impowered one *Smith*, a Bro-

a Broker, to ſell it; and afterwards the Defendant himſelf ſold it to a Stranger; and the ſame Day, and before Notice of the Sale by the Defendant, *Smith* ſold it to the Plaintiff, who demanded it of the Defendant, who denied it: And the Caſe was doubtful to *Rolle*; for if the Defendant's Sale ſhould ſtand againſt the Sale of *Smith*, before Notice of the firſt Sale, then ſhould he be chargeable for his Bargain, which he could not perform, without any Default in him. And on the other Side, it were hard that the Sale of the Owner, who had the abſolute Property of the Goods, ſhould be defeated by a ſubſequent Sale of him that had but a bare Authority. But in Concluſion he declared his Opinion, That the Sale of the Defendant ſhould ſtand good, and the Broker ought in each Caſe to make his Sale conditionally, if the Maſter had not ſold it before; but he ſaid, neither the Broker, nor his Vendors ſhou'd be liable to any Action for detaining the Goods, though demanded, without Notice given of the Sale by the Maſter, *Et partes concordaverunt.* *Aleyn* 94. *Alwin verſus Taylor.*

Trover lies for Money out of a Bag or Cheſt.

In Trover of ten Angels, and converting of them, the Defendant pleads, That there was a Wager betwixt the Plantiff and one *Currance*, concerning the Quantity of Yards of Velvet in a Cloak: And the Plaintiff and the ſaid *Currance*, each of them delivered into his Hands ten Angels, and each of them agreed, That if there were ten Yards of Velvet in a Cloak, that then they ſhould be delivered to the ſaid *Currance*, and if not, to the Plaintiff; and alledgeth, *in facto*, that upon meaſuring of the Cloak, it was found, That there were ten Yards of Velvet therein: Where-

Whereupon he delivered them to the ſaid *Currance*, which is the ſame Converſion, *&c.* And it was thereupon demurred and agreed, firſt, That an Action of Trover lies for Money out of a Bag or Cheſt. But for the Plea, *Gawdy* held it to be good enough; for the meaſuring thereof is the fitteſt way for trying it; and when it is ſo found by the meaſuring, he hath good Cauſe to deliver them out of his Hands to him who had won the Wager. But *Fenner* and *Popham* held, That the Plea was not good: For it may be that the Meaſuring was falſe, and therefore he ought to have averred *in facto*, That there were ten Yards, and that it was ſo found upon the meaſuring thereof. And he might well have pleaded the general Iſſue, and given all the Matter in Evidence, for it is but Evidence: And when he delivered it accordlng to the Intent of the Bargain, it is not any Converſion. Wherefore by the Conſent of *Gawdy*, *(abſente Clinch)* it was ruled, That Judgment ſhould be entered for the Plaintiff, unleſs other Matter were ſhewn, *&c. Cro.* 870. *Ledeſham verſus Labram.* See 1 *Cro.* 841.

General Iſſue, when it may be pleaded.

In Trover for a Box and 290 *Peciis argenti.* The Defendant demurred to the Declaration, the Plaintiff demurred to the Defendant's Demurrer, and concluded, *& hoc paratus eſt verificare*; the Defendant maintained his Demurrer, and put the Matter upon the Court. And firſt, the Court held, That Trover would lie for Plate generally. *Vide Style* 224, 264. 2*dly*, That all is diſcontinued by the Plaintiff's not joining in Demurrer, but demurring upon the Defendant's Demurrer; for there is no Difference between

Demurrer to a Demurrer makes a Diſcontinuance.

Trover lies for Plate generally.

pleading over when Iſſue is offered, and not joining in Demurrer, but pleading over; both are alike, and make a Diſcontinuance, 1 *Salk.* 219. *Campbell verſus St. John.*

Trover lies for Letters-Patents.

In Trover and Converſion for Letters-Patents of Wine-Licence. After Verdict for the Plaintiff it was moved in Arreſt of Judgment, 1. That a Record cannot be converted; *ſed non allocatur*, for the Word Letters Patents here ſignifies the Exemplification of them under the Broad Seal, and ſo it is intended in Common Parlance. 2. Becauſe the Date of the Letters Patents is not ſpecified; *ſed non allocatur*, becauſe there is ſufficient Certainty without it; beſides, the Date is upon Record. 3. Becauſe the Plaintiff does not alledge, That he was poſſeſſed of them *ut de bonis propriis: ſed non allocatur* after a Verdict: And the Declaration does mention that the Defendan knowing them to appertain to the Plaintiff, converted them, which implies as much, and Judgment *niſi, &c. Hard.* 111 *Jones verſus Wickworth.*

Trover lies for a Bill of Exchange. Indorſement of the Name only does not transfer the Property.

In Trover for a Bill of Exchange. The Caſe upon Evidence was, That the Plaintiff had a Bill of Exchange drawn upon the Defendant, and ſent it by *J. S.* to the Defendant to get it accepted; *J. S.* left it with the Defendant, and afterwards the Bill being loſt, the Plaintiff brought a Trover for it, and *J. S.* was now the Plaintiff's Witneſs for this Matter; and becauſe the Plaintiff had indorſed the Bill, it was objected, That *J. S.* could not be a Witneſs; and this Point being ſaved, the Court were all of Opinion, that the bare Indorſement, without other Words purporting an Aſſignment, does not work an Alteration of the Property; for it may ſtill

be filled up eieher with a Receipt or an Aſſignment, and conſequently *J. S.* is a good Witneſs. 1 *Salk.* 130. *Lucas verſus Haynes.*

The Widow of a Waterman, who, as was ſaid, by the Uſage of Waterman's-Hall may take an Apprentice, had her Apprentice taken from her, and put on Board a Queen's Ship, where he earned two Tickets, which came to the Defendant's Hands, and for which the Miſtreſs brought Trover: And it was agreed, the Action would well lie, if the Apprentice were a legal Apprentice; for his Poſſeſſion would be that of his Maſter, and whatſoever he earns ſhall go to his Maſter. But it was objected, 1. That the Company of Watermen is a voluntary Society, and that being free of it, doth not make a Man free of *London*: So that the Cuſtoms of *London*, for Perſons under one and twenty to bind themſelves Apprentices, doth not extend to Watermen; which was agreed by all. Then it was ſaid the ſuppoſed Apprentice here was no legal Apprentice; if the Indentures be not enrolled purſuant to the Act of Parliament of 5 *Eliz.* and if he were not a legal Apprentice, the Plaintiff had no Title. But *Holt*, Chief Juſtice, ſaid, he would underſtand an Apprentice, or Servant, *de facto*, and that would ſuffice againſt them being Wrong-doers. *M. Caſes.*

Trover lies for Tickets for Seamen Wages earned by a legal Apprentice, and againſt Wrong-doers it ſuffices to be ſo *de facto*.

Whether the Company of Watermen be more than a voluntary Society.

Trover for Million-Lottery-Tickets; upon Evidence it appeared, That the Plaintiff had given the Tickets in Queſtion to a Goldſmith to receive the Money due on them; that ſome Payments were due, and ſome were not; and this Goldſmith had received Tickets of the Defendant, and given him a Note to pay him ſo many Million

Goldſmith has Lottery-Tickets of *A.* and *B.* and delivers *A*'s Tickets to *B.* for his own. *A.* may maintain Trover againſt *B.*

Lottery-Tickets; that the Plaintiff's Tickets were delivered to the Defendant by the Goldſmith upon this Note. It was inſiſted on, that this Note under the Goldſmith's Hands, could be no Evidence againſt the Plaintiff; but it was read, and *Holt*, Chief Juſtice, ſaid, That the Way and Manner of trading is to be taken Notice of, and the beſt Proof that the Nature of the Thing will afford, is only required: When Goldſmiths gives their Notes, no Witneſſes are by; and their Notes to pay Money or Tickets are Evidence of the Receipt of Money. If Money is ſtolen and paid to another, the Owner of the Money can have no Remedy againſt him that received it; but if Bank-Notes, Exchequer-Notes, or Million-Tickets, or the like, are ſtollen or loſt, the Owner hath ſuch an Intereſt or Property in them, as to bring an Action into whatſoever Hands they are come: Money or Caſh is not to be diſtinguiſhed, but theſe Notes or Bills are diſtinguiſhable, and cannot be reckoned as Caſh, and they have diſtinct Marks and Numbers on them: He agreed in this Caſe, That if the Exchequer, or any private Perſon had paid to the Goldſmith the Money or the Tickets, it would have been a good Payment againſt the Owner; but whether it would be ſo where Tickets not due are bought for a valuable Conſideration, he doubted; but as the Caſe was, the Goldſmith having Tickets of the Plaintiff and of the Defendant, the Delivery of the Plaintiff's Tickets to the Defendant, was no Change of the Property, or any Conſideration; for tho' the Owner gave the Goldſmith Power to receive Money for the Tickets, he did not give

Goldſmith's Note to pay, Evidence of his receiving Money.

give him Power to change them for other Tickets; and accordingly Verdict was given for the Plaintiff. 1 *Salk.* 283. *Ford verſus Hopkins.*

In an Action of Trover and Converſion of five Oxen, the Defendant pleaded Not guilty, and by ſpecial Verdict it was found, That one *J. S.* as Bailiff to the Defendant, took thoſe Beaſts as for Heriots due to the Defendant, where there were not any due, and without any Command from the ſaid Defendant the Viſcounteſs *Montague*: But that afterwards ſhe agreed thereto, and converted them; and after that the Bailiff died. And, whether this Action lies, or that he ſhould have brought a general Action of Treſpaſs was the Queſtion? And *Walmſley* and *Kingſmill* held, That this Action lies not; for when the Bailiff took them tortiouſly, the Property is diveſted out of the Plaintiff, and the Poſſeſſion: So that he cannot ſuppoſe that he was poſſeſſed of them, until he loſt them, and until they came to the Defendant's Hands. And the Defendant by aſſenting to the taking is a Treſpaſſer *ab initio*; as 28 *Aſſ.* 9. 28 *E.* 3. 18 and 40 *E.* 3. 20. are: Wherefore, where he might have had a general Writ of Treſpaſs, he cannot have any other Manner of Action; eſpecially not this Action, which differs from it in Nature and Quality: But *Anderſon* and *Warburton*, *contra*. They agreed, That an Aſſent before or after the taking of the Goods made her a Treſpaſſer *ab initio*, and to be puniſhed as a Treſpaſſer. But not an Aſſent after to a Battery formerly done; or to that which is a Tort, and puniſhable by the Statute-Law, as an Aſſent to a Riot, or forcible Entry after it is done, ſhall not

Trover lies for Beaſts taken for Heriots, if not due.

Subſequent Aſſent makes one a Treſpaſſer *ab initio*.

Not in all, but in what Caſes.

not make him punishable. But although Trespass lies, yet he may have this Action if he will; for he hath his Election to bring either. And as he may have Detinue or Replevin for Goods taken by a Trespass, which affirms always Property in him, at his Election; so he may have this Action; for one may qualifie a Tort, but not increase a Tort. So he hath Election to make it a tortious Prisal or not; which is the Reason that if Goods be taken by a Trespasser, yet if the Party for whom they were taken, be attainted of Felony, he shall forfeit them; or the Right and Property remains in him, and the Law shall adjudge them in him until he makes his Election to the contrary, by bringing of a Writ of Trespass; wherefore he might mainrain the one Writ or other at his Election. Wherefore, *&c.* 1 *Cro.* 824. *Bishop versus* Viscountess of *Montague*. See *Shower* 81. *Parker versus Gage*; and *Winch*, 46, 47.

Election of Action.

Whereby a Tort is qualified but not encreased.

An Action of Trover and Conversion was brought, and upon the whole Matter the Case appeared to be this:

A Stranger took the Horse of the Plaintiff, and sent him to a common Inn, and there he remained for the Space of half a Year, at which Time the Plaintiff had Notice where his Horse was, and thereupon demanded him of the Innkeeper, who answered, That a Person unknown left the Horse with him, and said, he would not deliver the Horse to the Plaintiff unless he would pay him for his Meat which came to three Pounds ten Shillings for all the Time, and also would be sure that it was his Horse; upon which the Plaintiff demurred in Law.

Trover does lie against an Innkeeper for detaining a Horse not brought by the Owner, for his Diet.

And

And it was resolved by *Montague*, Chief Justice, *Croke* and *Doderidge*, Justices; (*Haughton*, Justice, dissenting) That the Defendant's Plea was good; for the Innkeeper was compellable to keep the Horse, and not bound, at his Peril, to take Notice of the Owner of the Horse; and by the Custom of *London*, if a Horse be brought to a common Inn, where he has (as it is commonly said) eaten out his Head, it is lawful for the Innkeeper to sell him; which Case of the Custom implies this Case. And there is a Difference, where the Law compels a Man to do a Thing, and where not; as if the Lieutenant of the Tower bring an Action of Debt for Diet against one who was his Prisoner: In this Case the Defendant cannot wage his Law; because the Law compels the Lieutenant to give Victuals to his Prisoner, otherwise if another Man brings an Action of Debt for Diet: And in this Case at the Bar the Innkeeper was compellable. And *Doderidge* said, That if the Law was as the Plaintiff would have it, it would be a pretty Trick for one who wants a keeping for his Horse. And *Mich.* 6 *Jac.* in the King's-Bench, between *Harlow* and *Ward*, the like was resolved as was cited by *Barkesdel*, of Counsel with the Defendant. *Popham*, 127. *Robinson versus Walter*. S. C. 3 *Bulst.* 268. S. C. 1 *Roll's Reports*, 449. S. P. 3 *Bulst.* 289. *Stirt versus Drungold*. S P. 1 *Bulst.* 170. *Skipwith versus* ———

When Trover lies for Goods taken for Taxes.

An Action of Trover may be brought for Goods taken for the King's Tax; if the taking were any ways unlawful; as if the Party were exempt from the Taxes, and the like. 2 *Mod.* 182. *Bell versus Knight*.

To try the Validity of the Commissioners of Excises Judgment.

Trover lies to try the Validity of the Judgment of the Commissioners of the Excise, if on Things over which have no Power; otherwise as it seems in Things within their Jurisdiction, and the proper Remedy in such Case is an Appeal. See *Hardress's Reports*, 478, and 480.

Trover lies for Goods distrain'd and sold, if the Directions of the Statute are not pursued. Distress in two Hundreds, *viz.* *A.* and *B.* in different Counties. Oath upon Sale administred by the Constable of *A.* in *B.* is well.

Trover for six Hogs, special Verdict was found, *viz.* That the Lands demised, lying in two Counties, *viz.* Part in the Hundred of *A.* in *Wilts*, and Part in the Hundred of *B.* in *Southampton*; the Lessor for Rent-Arrear distrained in both Hundreds, and the Distress being not replevied in five Days, Notice was given to the Owner of the Goods, and then he sent for the Constable of *A.* who, in the Presence of *B.* sold them in the Hundred of *B.* *Et per Cur.* First, Personal Notice it sufficient; for Notice is the Thing required. 2dly, Notice to the Owner is sufficient against him in Trover; but if the Tenant had brought Replevin, that would not have served as to him, but he must have had Notice also.

3dly, Tho' the Act requires the Oath should be administred by the Constable of the Hundred where the Goods are, and here the Constable of *A.* administred the Oath in the Hundred of *B.* where he had no Authority, yet this was held good; because the Defendant could not sever the Distress, it being intire as the Cause was, and the Hundreds contiguous; so that the driving was lawful, and a Continuance of the first taking. *Sed per Cur.* A Distress in *Middlesex* ought not to be driven into a distant County, as *Hampshire*. 1 *Salk.* 247. *Walter versus Rumball.* S. C. 4 *Mod.* 390.

Tro-

Trover for a Ship, and its Tackle and Furniture. Upon Not guilty pleaded, a ſpecial Verdict was, That one *William Gault*, a Denizen of *England*, was Owner of the Ship at the Time of the taking, and was *Dutch*-built, and taken in the War between the *Dutch* and *French* as a *Dutch* Prize, and condemn'd for Prize in the Court of Admiralty of *France*, and ſold; and that when the ſaid Ship was taken as Prize, there was Amity between *England* and *France*. That the Maſter was a *Dutchman* born, but a Denizen of *England*. The Mate was *Engliſh*, and eight Mariners, and two *Dutch* on Board; that the ſaid Ship was ſold to divers Perſons by virtue of the Sentence of the Admiralty of *France*, and that the Plaintiff bought the ſaid Ship from the Perſons to whom the ſame was ſold as aforeſaid; that the Defendants, as Servants of the ſaid *William Gault*, took the ſaid Ship from the Plaintiff; and if the Defendants be guilty, *&c.*

Trover lies for a Ship, *&c.*

The chief Queſtion intended was, Whether this Sentence ſhall be examined by the Common Law? And reſolved, it ſhall not; becauſe though it be in another King's Dominions, we ought to give Credit to it, or elſe they will not give Credit to the Sentences of our Courts of Admiralty, and the Defendants are at no Prejudice; for the Way is, if they find themſelves aggrieved, to petition the King, who will examine the Caſe, and if he finds Cauſe of Complaint, will ſend to his Ambaſſador reſiding with the Prince or State where the Sentence was given, and upon Failure of Redreſs, will grant Letters of Mark and Repriſal; and Judgment was given for the Plaintiff. *Raym.* 473. *Hughes verſus Cornelius, & al'.*

A Sentence in the Admiralty of *France* ſhall not be controverted in the Courts of *Weſtminſter-Hall.*

In

Trover lies for Jewels againſt the Perſon to whom the Teſtator had deviſed the Uſe and Occupation of them after the determination of their Intereſt by a Limitation annexed to the Deviſe.

In an Action of Trover and Converſion, by the Adminiſtrator of Serjeant *Davis*, for divers Jewels: Upon Not Guilty pleaded, the Jury found for Part Not Guilty; for other Jewels, That he is Guilty; and for ſixty-five great Pearls, and ſixty-five ſmall Pearls, and a Diamond Chain, they found a ſpecial Verdict; that Serjeant *Davis* was poſſeſſed of them, and being poſſeſs'd, made his Will, and thereby deviſed the Uſe and Occupation of all his Plate, Hangings and Jewels, to Dame *Elianor*, his Wife, during her Widowhood, ſhe giving good Security to my Daughter *Lucie*, Lady *Haſtings*, to deliver and leave the ſame to my ſaid Daughter *Lucie*, at the Day of her Death or ſecond Marriage, which ſhould firſt happen. That he died poſſeſs'd of thoſe Jewels, and that after his Death, the Adminiſtration of the Goods of the ſaid Sir *John Davis* was committed to the Plaintiff; that the ſaid *Elianor*, the Wife of Sir *John Davis*, was the Daughter of the Lord *Audley*, Earl of *Caſtlehaven*; and that ſhe in the Life of Sir *John Davis* uſed the ſaid Jewels, *Et ut Ornamenta Corporis ſui* uſually wore them; then afterwards the ſaid *Elianor* married with the Defendant, and that he converted thoſe Jewels, *&c.* And if the Court ſhall judge for the Plaintiff, they find for the Plaintiff, and Damages 370 *l.* and if not, for the Defendant. Upon this Special Verdict, it was openly argued at the Bench: And *Berkeley* and *Jones* argued for the Defendant, That ſhe being the Daughter of a Noble-man, and permitted to uſe them frequently, *ut Ornamenta Corporis ſui*, and they being convenient for her Degree, ſhe could have them as her *Paraphernalia*; and when there be not Debts to be paid (as

Paraphernalia, quid.

(as it doth not appear there were any) she shall have them against the Executors or Administrators of her Husband; and that the Husband cannot dispose of them from his Wife, by his Will; but instantly, by his Death, the Possession of them being in the Wife's Custody, the Property is immediately vested in her, and the Husband cannot give them away; and that is of Necessity and for Conveniency in the Law; for it is not reasonable the Husband should leave her naked of those Jewels which she usually did wear, and are fit (according to her Calling) to wear: And it appears by *Lyndewode*, that the Wife against her Husband's Will, hath such an Interest in Goods which are her *Paraphernalia*, that her Husband hath nothing to do with them; but she may make a Will of them in her Husband's Life-time, and may dispose of them, *in vita Mariti, invito Marito*; but they said, This is not allowable in our Law, that she should dispose of them in her Husband's Life-time; but when the Husband doth not dispose of them, they are instantly vested in the Wife: And although the Husband may make a Gift of them in his Life-time, yet he cannot make a Will to dispose of them, *&c.* and compared it to the Case, where a Feme hath a Term, and takes Baron, he may give and dispose thereof in his Life-time, but he cannot dispose of it by his Will; as in the Case of *Bransby* and *Grantham*, and the Case of *Bracebridge*, *Plow.* 416. and in the Case *primo Henrici quinti* Executor, 108. The King may give the Jewels of his Crown by Letters Patents; but he cannot by his Testament dispose of them. And *Berkeley* said, That this Permission of the Wife to wear them usually, is as a Gift of them to her by her Husband; and

How considered at the Civil Law.

May be given by Deed in the Life, but not by Will.

and compared it to the Case of 11 *Hen.* 4. 83. where one takes my Son and cloaths him, or my Wife and cloaths her; it is as it were a Gift of the said Apparel unto them, and I may take them again with the Apparel: And as by the Custom of *London* and *Wales*, (as *Jones* said) the Wife shall have the Moiety of the Goods, whereof her Husband dies possessed; yet her Husband in his Life-time may give all the Goods, but by his Will he cannot prejudice her, concerning her Part; wherefore he concluded, That she should have them notwithstanding the Will. And *Jones* said, That by the Civil Law, as the Condition to tie her from Marriage, so the Limitation to have these Jewels during her Widowhood, is void, because she is absolutely possessed of them; whereupon they concluded, That Judgment ought to be given for the Defendants. But *Richardson*, Chief Justice, and *Croke*, argued to the contrary; and that this is a good Will; and that she may not take them but according to the Will: But if the Husband had not made a Will, but had left them to the Disposition of the Law, and the Question had been betwixt the Executors or Administrators, and the Wife, where there be not any Debts or Legacies to be paid, or where there be Assets to pay all Debts and Legacies besides those Jewels; there, peradventure, the Law will allow her to take and enjoy them as her *Paraphernalia*. But where a Husband hath made a Will, and limited how she should have them, she ought to take them as her Husband appointed; and his Will is as good, and as well to be performed, as a Gift in his Life-time; and

Customs of *London* and *Wales*.

Jewels shall be *Paraphernalia* where other Assets sufficient to pay Debts, and no specifick Devise of them; but if there is, *Quære*.

and that it is not like unto the Case of 11 *Hen.* 4. 83. for there it is a good Gift to the Son, and to the Feme, by the Ravisher; and the Husband may well assent unto them. So are the Cases 11 *Hen.* 4. 12. and 34 *Hen.* 6. 10. That Goods dedicated to the Service of a Chapel or a Church, are a good Gift to the Wardens of them in Law; but this Permission by the Husband, for the Wife to wear them, cannot be a Gift of them in Deed nor in Law; for the Husband cannot give ought to the Wife, they being both but one Person in Law, And as to the Objection, That altho' an Husband may dispose of them by Act in his Life, yet he cannot by his Will; it was answered, True it is, That a Man who hath a Thing Real in another's Right, or a Chattle Personal in another's Right, altho' he may give, yet he cannot devise it, as *Plow.* 192. in *Bracebridge*'s Case. So where as Executor makes a Gift of Goods, which he hath as Executor, it is a good Gift; but a Devise of them is not good, because he hath them *in auter droit*. But of all Chattels Personal, altho' the Wife had them before Marriage, the absolute Property by the Marriage is vested in the Husband, and he may give them in his Life, or dispose of them by his Will: So of those Goods which are termed *Paraphernalia*, the absolute Property is in the Husband; and therefore he may well devise them. And to the Cases, That the Husband may by Gift of all his Goods, *bona fide*, prevent his Wife that she shall not have any Part of them, notwithstanding the Custom in *London*, *Wales*, or elsewhere; yet by his Will, if he deviseth them, it shall not frustrate what she ought to have by the Custom, they agreed to be good

Several Ways of giving. To Baron and Feme and Son.

To the Church-wardens.

Not by Baron and Feme.

Where the Interest of the Party determines by his Death, he cannot dispose of it by Will, but may by Deed of Gift executed in his Life-time.

Marriage is an absolute Gift.

Law; for Cuſtom is another Law, and inſtantly by the Death of the Husband veſteth the Intereſt in the Wife; but the Goods which ſhe claims as *Paraphernalia* be not given to the Wife, but thoſe which are of Neceſſity and Conveniency for her: And when the Husband leaves her what is for her Neceſſity, (*viz.*) neceſſary Apparel, he may well make a Diſpoſition of the Reſidue, by his Will; and for that Purpoſe was cited 19 *H.* 6. 14. A Feme for her Quarentine may have her living *de communi*; but ſhe may not take any thing, unleſs for Neceſſity. And where the Civil Law ſaith, That ſhe may make a Will in the Life of her Husband of her *Paraphernalia*; yet the Common Law (whereby we are to be guided) is expreſly contrary to it; That ſhe may not make a Will of any Goods but with her Husband's Aſſent; and that the Husband ſhould aſſent afterwards, and deliver the Goods according to her Will; for then it is as his own Gift: But of an Obligation or Things in Action, a Wife may make Executors by Aſſent of her Husband, and may make her Husband Executor, as appears by the Books 4 *Hen.* 6. 31. 39 *Hen.* 6. 27. 3 *Ed.* 3. *Deviſe*, 12. 26 *Ed.* 3. 71. And the Intereſt, and Poſſeſſion, and Property of ſuch Goods as are call'd *Paraphernalia*, are in the Husband, and he may deviſe them to his Wife; and that ſhe ſhall take them by the Deviſe, appears 33 *Hen.* 6. 31. where he deviſed to his Wife her Apparel; and ſhe juſtifies the taking of them by the Deviſe and Delivery of the Executor. 37 *Hen.* 6. 28. That ſhe ought to take only her neceſſary Apparel. 1 *Eliz. Dyer*, 166. 18 *Ed.* 4. 11. 12 *Hen.* 7. 33. & 34. That the Property and Poſſeſſion of thoſe Goods be in the Huſ-

Paraphernalia is neceſſary, not ornamental Apparel.

Husband, and she may not make a Will of them without her Husband's Assent. And a Case was cited in the Exchequer. *Trin.* 28 *Eliz.* betwixt the Lord Treasurer and others, Executors of Viscount *Bindon*, against *Mary*, Viscountess *Bindon*, in an Action of Trover and Conversion of Jewels, of the Value of 1000 *l.* She pleads to all, besides such Jewels, which were a Chain and Bracelets, not exceeding the Value of 160 *l.* Not Guilty; and as to them, she pleads, That she was the Wife of Viscount *Bindon* at the Time of his Death, and she usually wore those Jewels, as Ornaments of her Body; and avers, That the Executors had Assets to satisfy his Funerals, and all his Debts and Legacies, besides those Jewels; and Issue was taken, That that they had not Assets to satisfy all the Debts and Legacies, besides those Goods: So there it is to be observed, That Jewels of 160 *l.* for a Viscountess, were not allowable for *Paraphernalia*, if he had disposed them in Legacies. And it was answer'd, Altho' here in this Case, the Defendant be the Daughter of an ancient Baron of this Realm, and of an Earl in *Ireland*, yet being married to Serjeant *Davis*, she ought to have them as his Wife: And there is not any necessity she should have a Chain of Diamonds, and the said sixty-five great Pearls, and the sixty-five small Pearls, which are things hanging loose, and are not in any Chain or Bracelets; and they be not for any necessity for Ornament or for Covering. But *quacunque via data*, the Husband having expresly disposed of them by his Will, she may not against his Will take them without the Assent of the Administrator, and without Delivery, and not of her own Head detain them, without entering

entering Security: And where it is alledged, That in the Civil Law a Condition to reſtrain a ſecond Marriage, is not allowed; this is no Condition, but a Limitation only; and it is reaſonable ſhe ſhould take accordingly. And it was alledged, That this is not any Deviſe of thoſe Jewels, but only the Uſe and Occupation of the Plate, Hangings, and Jewels, during her Widowhood, (which may be) and no abſolute Gift of them; as is in 37 *Hen.* 6. 30. the Caſe of *Craple*, and *Plowd* in *Welden's* Caſe: And they concluded, That this is a good Diſpoſition by the Will, and a Declaration of his Intent, and takes away that which otherwiſe ſhe might claim by the Law; and his expreſs Declaration controls any implied Gift, as it is pretended. And foraſmuch as ſhe hath not performed it, the Limitation is determined, and neither ſhe nor her Husband can have them; wherefore they concluded for the Plaintiff. 3 *Cro.* 343. Lord *Haſtings verſus* Sir *Archibald Duglaſs*. See *Moore's Reports*, 213. Viſcounteſs of *Bindon's* Caſe of *Paraphernalia*.

What a Condition is, what a Limitation.

Deviſe of Uſe and Occupation, no Gift.

In Trover of Goods, on the twenty-fifth of *November*, *anno tertio Caroli*: Upon Not guilty, a ſpecial Verdict was found, That one *John Hill* and *Alice Squire* were poſſeſſed of thoſe Goods, and uſed the Trade of Merchandize, and being ſo poſſeſſed, were bound to the Defendant, *anno viceſimo primo Jacobi*, in a Statute, acknowledged according to the Statute of *viceſimo tertio Henrici octavi*, *capite ſexto*, for a true and juſt Debt; and that being forfeited, he ſued an Extent upon that Statute, *viceſimo Octobris tertio Caroli*, directed to the Sheriffs of *London*, and that they, by Virtue of that Extent *viceſimo primo Octobris tertio Caroli*, extended

When Trover lies for Goods ſeized by the Commiſſioners of Bankrupt, and ſold, againſt one claiming under an Extent grounded on a Statute.

ded thoſe Goods, (the Writ being returnable *in Craſtino Animarum*) and returned the Writ and Inquiſition into the Chancery, That the third of *November*. 3 *Car*. the ſaid *John Hill* and *Alice Squire* became Bankrupts, being indebted to the Plaintiff, and to divers others, for true and juſt Debts. That upon the ſixth Day of *November*, 3 *Car*. the Defendant ſued a *Liberate* upon that Extent, and thoſe Goods the ſame Day were delivered by the Sheriffs according ro the Appraiſement in the Extent; That afterward, *viz*. upon the eighth Day of *November*, the Plaintiff, and others, ſued out the Commiſſion of Bankrupts againſt the ſaid *Hill* and *Squire*, and the Commiſſioners, by Virtue of their Commiſſion, ſold thoſe Goods to the Plaintiff upon the three and twentieth Day of *November*, 3 *Car*. and that the Defendant afterwards, *viz*. the twenty fifth Day of *November*, the ſame Year, converted them, *&c. Et ſi ſuper totam*, &c. And it was argued ſeveral Days at the Bar, and the ſole Queſtion was, Whether *John Hill* and *Alice Squire* becoming Bankrupts after the Extent, and before the *Liberate*, the Sale of the Commiſſioners unto the Plaintiff, after the Goods delivered upon the *Liberate*, be good? And it was argued by *Noy* and *Farrer* for the Plaintiff, That this Sale is good; for notwithſtanding this Extent, the Property of the Goods remain in the Conuſors, and by the Extent are only ſeiſed into the King's Hands, but that ſhall not divert any Property from the Conuſors; for they be as it were in the Protection of the King, and then when the Conuſors become Bankrupt before the *Liberate*, thoſe Goods are in the Power of the

Sale of Goods by the Commiſſioners of Bankrupts of one becoming Bankrupt after the Extent, and before the *Liberate*, whether good.

Commiſſioners to ſell and diſtribute amongſt the Creditors; and they relied eſpecially upon the Book of 3 *Ed.* 6. *Dyer* 67. where Goods be extended, yet were ſubject to be ſeiſed for the King's Debt: And they alſo relied upon the Statute of 13 *Eliz.* *c.* 7. and chiefly upon the Statute of 21 *Jac.* whereby it is provided, That Commiſſioners may ſell Goods or Lands, notwithſtanding Judgments, Statutes, Executions, or Extents, not ſerved or executed; and that, they ſaid, was not done until the *Liberate*; otherwiſe there would be a Miſchief: For then there may be an Extent, and no *Liberate* be ſued after upon it, as the Book of 31 *Hen.* 6. *Brooke* Statute 41. But all the Court reſolved, and ſeverally delivered their Opinions, That thoſe Goods, extended before they became Bankrupts, and delivered by the *Liberate* after they became Bankrupts, could not be ſold by the Commiſſioners; becauſe they being extended, are *quaſi in Cuſtodia legis*; ſo as the Conuſors have not any Power to give, ſell, or diſpoſe of them; and although by the Extent the Conuſee hath no abſolute Intereſt nor Property in them, until the Delivery by the *Liberate*, and at the Return of the Writ, may refuſe them for being overvalued, yet that is for the Advantage of the Conuſee: For the Extent is *Capias in manus noſtras, ut eas liberari facias*, and they be as Goods gaged or diſtrained, which cannot be forfeited by Outlawry, or taken in Execution from the Party who hath them in Gage, or by way of Diſtreſs, without Payment of the Money. *Vide* 37 *Hen.* 6. *f.* 10. 22 *Ed.* 4. *f.* 11. 3 *Hen.* 8. *Bro. Pledges* 28. and 13 *Rich.* 2. For the Goods are bound by the *Teſte* of the Writ

Goods extended are *in Cuſtodia legis.*

Writ of Extent or Execution sued; as 2 *Hen.* 4. *f.* 14. 4 *Hen.* 6. *f.* 58. and *Coke's Rep. fol.* 171. The Goods are bound by the Execution sued, but the Land is bound by the Judgment; and by the Extent they are to be taken by the Conusee; and it is good against the Conusor: And the Case here is stronger; for that the Extent is returned before they became Bankrupts, and the Delivery by the *Liberate* was before the Commission of Bankrupts was sued out; and it is not like unto the Case of 3 *Ed.* 6. *Dyer* 67. for there although the Goods were extended, yet they were not delivered to the Conusee, and the Writ was not returned; and the Writ of Privilege was for Debt due to the King, wherein the King hath his Prerogative by the Common Law: And yet it is said there, That others were of a contrary Opinion: Also when the Writ of *Liberate* is sued, it hath Relation to the Writ of Extent, and they be *quasi* but one Extent; and the Goods are so bound by the Extent and Appraisement, that the Conusor hath not any more Property in them, but *secundum quid*, and not *simpliciter*; that is, if the Conusee refuse to accept them; for it is a conditional Writ to deliver them to the Conusee, if he will accept them; and when he accepts them they are bound *ab initio*. And *Jones* cited a Case 19 *Jac.* in the Common Bench betwixt *Brumsted* and *Bathurst*, where an Under-Sheriff took an Obligation for his Fees for serving an Extent, before the *Liberate*: It was held not allowable, but he ought to have stayed until the *Liberate*. And whereas it was objected, That the Writ is not served nor executed until Delivery of the Goods upon the *Liberate*, and therefore the Commissi-

Goods are bound from the Time the Execution is sued, Land from the Time of the Judgment.

Property in Goods is either *secundum quid*, or *simpliciter*.

oners had Power of them, They all conceived, That the Statute being with an Exception, where Execution or Extent is ſerved or executed, that this is to be accounted the executing of an Extent, when the Goods be appraiſed, and the Writ returned; but ſo long as they remain in the Hands of the Conuſors, they may be ſold; but when they are delivered by the *Liberate*, the Commiſſioners have no Power to meddle with them; and it was ſaid, That the Statute of 21 *Jac.* provides, That Goods attach'd by foreign Attachments in *London*, ſhall be ſold by Commiſſioners, which proves, That after the Statute of 13 *Eliz.* until the Statute of 21 *Jac.* the Commiſſioners had no Power to meddle with Goods taken upon a foreign Attachment, yet they are but as a Pledge to draw the Party to anſwer, and if he appear, the foreign Attachment is diſcharged; wherefore this Extent being returned ſerved, the Goods be not ſubject to other Executions, nor to the Power of the Commiſſioners: And it was therefore adjudged for the Defendant. 3 *Cro.* 148. *Audley verſus Halſey.*

Trover by the Aſſignees before Seiſure.

The Aſſignees of the Commiſſioners of Bankrupts may bring Trover for Goods ſold by the Bankrupt, after the awarding the Commiſſion; and the Sale is void, tho' the Goods were never ſeiſed. *Moore*, 594. *Smith v. Miles. S. C.* 2 *Co.* 25.

Trover for Goods diſtrained for Rent by one not intitled to it.

In Trover for Goods the Caſe was thus: The Goods were diſtrained by the Defendant for Rent, which he claimed as Occupant, and the Court reſolved, That the Action lay, and that there could be no Occupant of a Rent. *Yelv. Salk. Bulſt. S. C.* 1 *Cro.* 901. *S. C. Moore*, 664. See *Vaughan*, 186.

In

In an Action of Trover of twenty Loads of Wheat, &c. upon Not guilty pleaded, and a special Verdict, the first Question was, Whether a Lease for three Lives by Indenture, dated the thirtieth of *August anno* 20. *Eliz. habendum a die datus*, and Letter of Attorney made the first of *September anno* 20. *Eliz.* to make Livery, and Livery is made accordingly, be a good Lease? Because if Livery had been made the same Day it bears Date, and Letter of Attorney had been in the same Deed, it had been merely void. The second Question; Admitting that Livery by Letter of Attorney subsequent be good, Whether a Lease being made by a Bishop for three Lives to one for Life, Remainder to a second for Life, Remainder to a third for Life; so not warranted by the Statute of 1 *Eliz. cap.* 4. and the Successor accepts the Rent: whether this be a good Lease against the Successor himself, who accepted the Rent, and shall bind him during his Time, so as he cannot enter to avoid it, and make a new Lease? These were the Points intended, and were argued at the Bar; but for a Fault in the Lease, whereby the Defendant claimed, the Matters in Law were not resolved; but Judgment was given for the Plaintiff, without any of the Justices Opinions concerning this Point. The Fault was, That the Bishops there usually by one Lease had let three Manors, reserving 32 *l.* Rent yearly, which was found to be the ancient Rent; and the Bishop here makes a Lease, *habendum* to *Thomas ap Rees*, and his Assignes, rendering to the Bishop and his Successors the usual and accustomed yearly Rent, and the Rents and Services at the Days and

Trover lies for Goods taken tortiously on a supposed Right to distrain.

Livery of Lease, what good.

Acceptance of Rent or Dues by a voidable Lease, whether it makes it good.

Lease void for want of a proper Reservation of Rent.

Times uſually accuſtomed, and he doth not ſhew any Rent in certain; and becauſe the ancient Rent of 32 *l.* had been uſually paid, where the three Manors were let together, but there was not any old Rent reſerved upon this Leaſe with ſuch Exception, (and then the old Reſervation is meerly void, and no Rent at all reſerved) therefore all the Court held, That this Leaſe under which the Defendant claims, is a void Leaſe by the Statute to bind the Succeſſor; and the Succeſſor having entered and made a good Leaſe to the Plaintiff, if this Leaſe to the Defendant be not *in Eſſe*, it ought to be adjudged for the Plaintiff: But in the Argument of this Caſe at the Bar; for the firſt Point a Caſe was cited betwixt *Greenwood* and *Tyler*, in the King's Bench, *Trin.* 17. *Jac. rot.* 1179. where it was adjudged, (and confirmed afterwards in the Exchequer-Chamber upon a Writ of Error) That if one makes a Leaſe for Life by Indenture, dated *viceſimo die Auguſti, ſecundo Edwardi ſexti, Habendum* from *Michaelmas* following, for three Lives, and Livery is made by the Leſſor after *Michaelmas*; it is a good Leaſe by the Indenture, (for it was a Leaſe by Baron and Feme of the Land of the Feme, which ought to inure by the Deed, otherwiſe it had not been good to bind the Feme; ſo it was adjudged it bound her. So it ſeemeth a Letter of Attorney being two Days after the Deed, is as good as if it had been made in Perſon. And for the ſecond Point, another Caſe was cited to be adjudged in the Common Bench, *Paſch* 5 *Jac. Rot.* 1041. betwixt *Wheeler* and *Danby*, upon an eſpecial Verdict in an *Ejectione firmæ*, for an Acre of Land in *Mayſemore* in the County

of

of *Glouceſter*, That whereas *Richard*, Biſhop of *Glouceſter*, was ſeiſed in Fee of the Manor of *Mayſemore*, whereof this Acre is Parcel, and by Indenture 8 *Eliz.* demiſed that Acre to *Jaſper Danby* and *William Danby*, *Habendum* to the ſaid *Jaſper*, *a die datus Indenturæ* for his Life, Remainder to the ſaid *William Danby* for his Life, rend'ring three Shillings and two Pence by the Year, at *Michaelmas*, and at the Annunciation; and that the ſaid *Richard*, Biſhop of *Glouceſter*, died, and *Godfrey*, late Biſhop of *Glouceſter*, was created Biſhop; and having Notice that divers Rents of the ſaid Manor were due and unpaid, commanded *J. W.* his Bailiff of the ſaid Manor, to receive the ſaid Rents arrear, who accordingly received them; whereof the Rent of the ſaid *William Danby* was amongſt others paid to the ſaid *Godfrey*; not giving Notice particularly to the ſaid Biſhop, that the ſaid Rent, received of the ſaid *William Danby*, was the Rent of the ſaid *William*; and that the ſaid Biſhop generally, 43 *Eliz.* accepted of all the ſaid Rents by the Hands of his Bailiff; and found the Statute of 1 *Eliz.* and that the ſaid *Godfrey*, Biſhop of *Glouceſter*, *primo die Aprilis* 44 *Eliz.* demiſed to the ſaid Plaintiff the ſaid Acre, and all the Tithes growing thereupon, for one and twenty Years; and that the ſaid Plaintiff entred, and was poſſeſſed until the Defendant, *William Danby*, ejected him: And upon this Verdict Judgment was for the Defendant. And it was alledged at the Bar, that it was reſolved hereupon, That altho' the Leaſe be for Life *Habendum a die datus.* yet being found *Quod Epiſcopus dimiſit*, it ſhall be intended, that Livery was

made after the Day; and then it was a good Leaſe. Secondly, This Acceptance of the Rent by the Biſhop's Succeſſor, ſhall bind him for his Time, ſo as he ſhall not void that Leaſe which was otherwiſe voidable; becauſe it is a Leaſe of Parcel of the Demeſns, and for two Lives, the one after the other in Remainder: And the Copy of this Record was brought in, where Judgment was given upon this Verdict for the Defendant. But *Quære*, Whether it were for this Cauſe alledged, or for that the Plaintiff's Leaſe was not warranted by the Statute of 1 *Eliz.*? 3 *Cro.* 94. *Owen v. Thomas Ap-Rees.*

If undertaking to carry Goods of all Perſons indifferently for Hire, is a common Carrier, and the Goods are privileged. Therefore Trover lies againſt one that diſtrains them.

In Trover upon a Special Verdict, the Caſe was, The Goods in the Declaration were the Plaintiff's, and by him delivered in *London*, to one *Richardſon*, to carry down to *Birmingham*. This *Richardſon* was not a Common Carrier, but for ſome ſmall Time, laſt paſt, brought Cheeſe to *London*; and in his Return took ſuch Goods as he could get, to carry back in his Waggon into the Country for a reaſonable Price. When he returned home, he put the Waggon, with the Cheeſe, into the Barn, where it continued two Nights and a Day, and then the Landlord came and diſtrained the Cheeſe for Rent due for the Houſe, which was not an Inn, but a private Houſe: And it was agreed *per Cur'*. That Goods delivered to any Perſon exerciſing a publick Trade or Employment, to be carried, wrought, or managed in the way of his Trade or Employ, are for that Time under a legal Protection, and privileged from Diſtreſs for Rent; but this being a private Undertaking, required a further Conſideration; and it was reſolved,

That

That any Man undertaking for Hire to carry the Goods of all Persons indifferently, as in this Case, is, as to this Privilege, a Common Carrier; for the Law has given the Privilege in Respect of the Trader, and not in Respect of the Carrier. And the Case in *Cro. El.* 596. is stronger: Two Tradesmen brought their Wool to a Neighbour's Barn, which he kept for his Private Use; and it was held, That could not be distrained. 1 *Salk.* 249. *Gisbourn v. Hurst.*

Trover and Conversion lies for Emblements.

In an Action of Trover and Conversion, brought for two Hundred and fifty Pounds of Hops, upon Not Guilty pleaded, the Case appeared to be; Feme, Tenant for Life, takes to Husband the Plaintiff, 5 *Car.* the Remainder being to the Defendant for his Life. These Hops were growing out of antient Roots, being within the Lands in Question: The Feme dies 19 *Aug.* 9 *Car.* the Hops then growing, and not severed, *&c.* And whether these Hops appertained to the Baron, or to him in Remainder? was the Question; because she died so small a while before the gathering of them; and they be such Things as grow by Manurance and Industry of the Owner, by the making of Hills, and setting Poles. And the Court, upon the Motion of *Grimston*, who was of Counsel with the Plaintiff, held, That they are like Emblements, which shall go to the Baron or Executor, of the Tenant for Life, and not to him in Remainder; and are not to be compared with Apples or Nuts, which grow of themselves; wherefore adjudged for the Plaintiff. 3 *Cro.* 515. *Latham ver. Atwood.*

Hops are Emblements.

In

In an Action on the Case for a Trover and Converſion of certain Timber-Trees: The Caſe and Queſtion was, as touching the Power of a Copyholder for Life, for the cutting down of Timber-Trees; and whether ſuch a Copyholder may preſcribe by the Law for to cut down Timber-Trees, growing upon his Copyhold-Land, or not? *Noy*, for the Plaintiff That he cannot. *Williams*, Juſtice, Such a Copyholder for Life cannot preſcribe for to cut down Timber-Trees growing upon his Copyhold-Land; and to this Purpoſe, in *Lutterell* and *Wood*'s Caſe in the *C. B.* it was adjudged in Point, That a Copyholder for Life cannot preſcribe to cut down Timber-Trees; but by way of Uſage he may for Reparations. And as touching Uſage and Cuſtom, it appeareth, in 21 *E.* 4. *fo.* 28. *b.* That Uſage and Cuſtom to turn their Plow upon the Headland not ſowed with Corn, is good; but there it is ſaid by *Littleton*, That a Preſcription againſt Reaſon is not good; as if a Cuſtom be alledged, That none ſhall put his Cattle into his Land before the Lord do put his Cattle in; this is held to be a void Cuſtom, becauſe it is againſt Reaſon; for if the Lord will never put in his Cattle, the Tenants by this will loſe the Profit of their Soil: But otherwiſe it is where a Day is limited; and to this purpoſe, 22 *E.* 4. *fol.* 8. *A. B. pla.* 24. And that a Preſcription which is againſt Reaſon is void, and ſhall not be allowed by Law. See for this *Littleton*, *fol.* 46. *Pla.* 209. and *Pla.* 212. and 5 *Hen.* 7. *fol.* 96. and 10. *a.* In this principal Caſe here the clear Opinion of the Court was, That this Preſcription here for a Copyholder for Life to cut down Timber-Trees, is a Preſcription againſt Reaſon, and

and ſo void in Law; and ſo was the Opinion of the whole Court; but no Judgment was then given. 1 *Bulſt.* 158. The Earl of *Northumberland* Plaintiff, againſt *Wheeler* and others, Defendants.

Trover for 100 Loads of Wood, upon ſpecial Verdict the Caſe was, This Copyhold-Land was ſurrendered to the Uſe of *J. S.* for Years, Remainder to the Brother of the Plaintiff's Wife, who died before the Term expired; and ſo was not admitted any otherwiſe, than by the Admiſſion of the Tenant for Years; and it was reſolved; Trover lies againſt one who wrongfully cuts Trees of a Copyhold Eſtate.

Firſt, That the Admittance of him that had the Eſtate for Years, was not an Admittance for him in the Remainder. 4 *Co* 23. *A.* 3 *Cro.* 504. Fine *ſur* Grant and Render to *A.* for Life, Remainder to *B.* Execution ſued by *A.* ſerves for *B.* So an Attornment to Tenant for Life ſerves for him in Remainder, and this brings no Prejudice to the Lord; for a Fine is not due until after Admittance; and the Lord may aſſeſs one Fine for the particular Eſtate, and another Fine for the Remainder. But *Wylde* ſaid, he need not pay it until his Eſtate comes in Poſſeſſion. After a Surrender the Eſtate remains in the Surrenderor before Admittance of the *ceſtuy que Uſe:* Yet where *Borough-Engliſh* Land was ſurrendered to the Uſe of *J. S.* and his Heirs, and he died before Admittance, it was held, That the younger Son ſhould have it.

Secondly, It was reſolved, That the Poſſeſſion of the Tenant for Years was ſo the Poſſeſſion of him in Remainder, as to make a *Poſſeſſio fratris.* But then it was moved, That the Converſion was laid after the Matriage; and ſo the Feme ought not to have joined with her Huſ-

Husband in the Action. But the Court held, That is regard the Trover was laid to be before the Marriage, which was the Inception of the Cauſe of Action, the Wife might be join'd; as if one has the Cuſtody of a Woman's Goods, and afterwards marries her, ſhe may join in Detinue with her Husband; for in Caſe of Bailment the Proprietor is to ſome Purpoſes in Poſſeſſion, and to ſome out of Poſſeſſion. *Hale* ſaid in this Caſe, The Huſband might bring the Action alone, or jointly with his Wife; and ſo Judgment was given for the Plaintiff. 1 *Vent.* 260. *Batmore & ux. ver. Graves. S. C.* 1 *Mod.* 102.

Trover lies for Tithes if tortiouſly taken.

In Trover for 20 Loads of Hay; upon Not Guilty a Special Verdict was found, That this Hay was Parcel of the Tithes, ſevered from the nine Parts, pertaining to the Rectory of *Hackley*, and demiſed and demiſeable, Time, *&c. ſecund. Conſuetud. Manerii de Hackley*, and the Prior of *Newbery* was ſeized in Fee of the Manor and Rectory of *H.* and in 27 *H.* 8. demiſed thoſe Tithes by Copy to *H.* under whom the Defendant claimed; and afterwards, by the Diſſolution, *&c.* the Manor came to King *H.* 8. who convey'd it to the Archbiſhop of *York*, who let the Rectory to the Plaintiff, who claim'd thoſe Tithes: And the Defendant, under Pretence of that Copy, carried them away. *Et ſi, &c.* The ſole Queſtion was, Whether thoſe Tithes were grantable by Copy, *&c.*? And it was moved for the Plaintiff, That they were not; firſt, in Reſpect of the Nature of Tithes, wherein none could have Propriety before the Council of *Lateran*, which was in the Time of K. *John*; for before that Time every one might have

What grantable by Copy.

have paid them to whom he pleased; but by those Constitutions, they are annexed to the Rectory: It is then impossible that there should be any Custom to demise them by Copy, from Time, *&c.* whereas none had Intereſt in them but within Time of Memory. Tithes also cannot pass but by Deed; and therefore to grant them by Copy of Court-Roll, cannot be good. There cannot also any thing pass by Copy, but that which is Parcel of the Manor: But it hath been adjudged, that Tithes cannot be Parcel of a Manor, wherefore, *&c.* And of that Opinion was *Popham*, for the first and last Reasons; for altho' Common, and *Prima vestura prati*, may be granted by Copy, because they be Parcel of the Manor; yet Tithes cannot be so, because they cannot be Parcel of a Manor; for a Manor and Tithes are of several Natures, altho' they be united in one Man's Hand; and then it is impossible, that that which is not Parcel of a Manor can be demised *Secund. Consuetud. Manerii*; and therefore it was adjudged, in the Time of Queen *Mary*, in the Case of the Duke of *Suffolk*, That where one had two Manors, and granted a Copyhold of the one Manor, at the Court of another Manor, that it was a void Grant; for it cannot be a Copyhold, according to the Custom of the Manor whereof it is not Parcel. But *Gawdy* doubted thereof, and conceived it had been well enough, if it had been so used from Time whereof, *&c.* But, because upon the Verdict it did not appear, That it had been granted by Copy from Time whereof, *&c.* It was held, That there was not any Title found for the Defendant; and therefore adjudged for the Plaintiff. 1 *Cro.* 814.

Sands

Sands ver. Drury. See *Yelv.* 42. *Chambers* and *Maſon.* 1 *Bulſt.* 120. *Pultney ver. Marſe. Pal.* 104. *Embden v. Dennis. Latch* 176. and 184. *Bellamy v. Bathorp. S. C. Noy* 89. *S. C. Godb.* 373. *Hardr.* 381. *Ingoldsby v. Wyvel & al.* 3 *Lev.* 365. *Wharter v. Leſtes.*

Trover lies for tortious taking of *decimam garbam.*

Action of Trover of Corn. The Matter in law, whereupon the Demurrer was grounded, was, The Lord of the Manor of *Pr.* within the Pariſh of *Ovingham* in the County of *Northumberland*, preſcribed, That he, and all his Anceſtors, and all thoſe whoſe, *&c.* had uſed from Time whereof, *&c.* to pay to the Parſon of O. (the now Plaintiff) and all his Predeceſſors, 6*l.* for all Manner of Tithes growing within the ſaid Pariſh; and that by Reaſon thereof, he, and all they, whoſe, *&c.* Lords of the Manor, had uſed from Time whereof, *&c.* to have *decimam Garbam, ſive decimam Cumulum Garbarum ſeu Granorum* of all his Tenants within the ſaid Manor: And whether theſe were good Preſcriptions, or not? was the Queſtion. *Popham, Gawdy*, and *Fenner* held, That they were good; and as to the firſt, they conceived that a *Modus decimandi* by the Lord, for himſelf and all the Tenants of his Manor, to bar the Parſon from demanding Tithes *in Specie*, is good; for it might have a lawful beginning, (*viz.*) That before 'twas a Manor all the Lands were in the Lord's Hands, and 6*l.* was paid for the Tithes thereof; then when he conveys a Parcel thereof to others, it ſhall be diſcharged as it was in the Lord's Hands; as in the Caſe of Dr. *Cotton, Mich.* 39. & 40. *placito* 19. And as to the ſecond Preſcription, That it was good to have the Tenth Shock, *&c.* for he hath it as a

Preſcription for Tithes, what good, and *econtra.*

Pro-

Profit apprender, as Parcel or Thing appurtenant to his Manor, and not as Tithes. For a Layman cannot have Tithes by Preſcription, becauſe he is not capable of them, in Regard they are Spiritual. But he may have the Tenth Shock as a temporal Profit apprender; as 44 *E.* 3. 5. And it well may be Parcel of a Manor: Otherwiſe of Tithes, which cannot be ſaid to be Parcel, or Appendant to a Manor; as it was adjudged in *Winch*'s Caſe, 35 *El.* And ſo is the Book of 10 *Ed.* 3. 5. And therefore if the Lord had preſcribed to have had *decimas Garbarum*, it had been ill; but when he preſcribes to have *decimam Garbam, &c.* it is otherwiſe; for ſo there is a difference betwixt the Pleading for Tithes, which are ſpiritual, and of a Tenth, which is temporal. They alſo agreed, That if the Queen was Lady of a Manor, ſhe may preſcribe to have Tithes, for ſhe is capable of them, altho' they be ſpiritual; as 22 *Aſſ.* 75. for ſhe is *Mixta Perſona & Capax Spiritualis Juriſdictionis*; as 23 *Ed.* 3. *Aid de Roy*; wherefore, *abſente Clinch*, they adjudged it for the Defendant. 1 *Cro.* 599. *Pigot ver. Hearn.* 2 *Co.* 45. *S. C. Moore*'s *Rep.* 483. *S. C.*

Lord may preſcribe for the Tenth Shock as Appurtenant to his Manor, but not as Tithes.

The difference between *decima garba* and *decimas garbarum.*

The King is *mixta Perſona*, ſo may preſcribe for Tithes.

In an Action of Trover, upon Demurrer, the Caſe was, The Plaintiff being Owner of the Rectory of *Evingham* in the County of *Northumberland*, brought his Action *ſur* Trover of 20 Load of Wheat in *Harlow*, being the Tithes of the Rectory, ſet out from the nine Parts. The Defendant pleaded, That *Harlow* was a Member of the Manor of *Pridhoe*, both which are within the Pariſh of *Evingham*, and conveys the Manor to the Earl of *Northumberland*; and preſcribes, That the

E. of

E. of *N.* and all thoſe, whoſe Eſtate he had in the ſame Manor, from Time whereof, *&c.* had paid to the Parſon of *E.* ſix Pounds annually, in Satisfaction of all Tithes within the ſame Manor; and further, That the ſaid Earl and all thoſe whoſe, *&c.* had uſed to have in Reſpect of the ſaid ſix Pounds, the tenth Part of all the Corn within the ſaid Manor; and ſo theſe Tithes within the ſaid Manor being ſevered from the nine Parts, he took by Title under the ſaid Earl. And it was thereupon demurred, and argued for the Plaintiff, That this was not any Plea; for a Layman is not capable of Tithes, and therefore no Continuance of Time can give him any Title to that, whereof he is not capable; for by the ancient Courſe of our Law, he cannot ſue for them; and the Civil Law did not permit a Man to ſue for them there; and ſo he had not any Remedy, and therefore not any Right. There is not any alſo can preſcribe in a Thing in Groſs, *per que Eſtate*; and here he preſcribes as for a Thing in Groſs: And he cannot preſcribe as to a Thing appurtenant to a Manor; for a ſpiritual Thing cannot be appendant to a temporal; and for that Purpoſe cited a Caſe to be ruled in this Court betwixt *Shirwood* and *Winchcomb.* 39 *Eliz.* Wherefore, *&c.* But all the Court, upon the firſt Motion, reſolved to the contrary, That it is a good Preſcription; that when the Lord hath uſed from Time, whereof, *&c.* to pay this Sum, *&c.* and in Reſpect thereof to have all the Tithes within this Manor, it ſhall be intended, That at the beginning the Lord had all in Hands, and then might preſcribe to pay a Sum in Diſcharge of all the Tithes within

in the Manor; and when he gave the Tenancies to hold of him, and always afterwards uſed to have the Tithes of thoſe Lands and Tenements; it is a very reaſonable Preſcription: For now he hath no more than what he had before; for he had them before by Retainer, and now he takes the Tithes themſelves. And *Gawdy* ſaid, It may be true, that the Parſon before Time of Memory granted thoſe Tithes to the Lord of the Manor, rendering Rent, which was confirmed by the Patron and Ordinary; and this being before Time of Memory, may well be ſo intended. *Quod Popham conceſſit*, and ſaid, That that was their principal Reaſon of the Judgment between *Pigot* and *Hearn*. And they ſaid, That in this Caſe the Lord might have good Remedy at the Common Law, or in the Spiritual Court; wherefore they intended to have adjudged it for the Defendant. But then Exception was taken to the Pleading, That the Converſion was ſuppoſed 10 *Sept.* 40 *Eliz.* and the Defendant ſaith, That he found them the 20 *Sept.* 40 *El.* and converted the 10. of *Sept.* which is repugnant in itſelf, which the Court held incurable. *Vid.* 1 & 2 *Ph. & Ma. Dyer* 3. 1 *Cro.* 763. *Pigot v. Simpſon* and others.

How to juſtify the Converſion as to the Time of doing.

In an Action of Trover and Converſion of two Lambs. The Defendant was found Not Guilty for one of them; and for the other, the Jury gave a Special Verdict to this Effect, The Prior of *Deynere* was ſeiſed of the Advowſon of *Norton*, appropriated to their Priory; and alſo of the Vicarage of *Norton*, which Vicarage was endowed with the Altarage and ſmall Tithes. And this Appropriation and Endowment, was in the Time of King *John*, and ſo continued until the Reign

Trover to try, whether a Vicarage was diſſolved or not.

H. 6. when, upon the Prior's Petition to the Pope, in Regard the Priory was poor, *&c.* the Pope granted by his Bull, *Quod de cætero*, the Prior ſhould appoint one of his Monks to officiate the Cure, who ſhould be removable, *ad Nutum Prioris, &c.* And Whether the Vicarage was hereby diſſolved? was the Queſtion. And it was argued at the Bar by *George Croke* and *Davenport*, for the Plaintiff, and by *Crew* and *Noy*, for the Defendant. And for the Plaintiff ſaid, That in Regard here was not any Act of the Ordinary's, nor any Licence from the King, it might be objected, That the Vicarage ſhould not thereby be diſſolved. But it was thereto anſwered, That the Want of either of them cannot ſet a-foot this Vicarage; for the Ordinary's Act or Concurrence was not requiſite, it being good enough by the Pope only; becauſe at that Time the Pope was ſupreme Ordinary, to whom the inferior Ordinaries ſubmitted: And it was good alſo without the King's Licence, in Regard that the making and endowing were Spiritual Acts, and done by the Ordinary, the Patron not having any thing to do therein; then *eodem modo quo factum eſt diſſolvitur.* As in 14 *H.* 5. 16. it is ſaid, That the making a Vicar is a Spiritual Act. The Stat. of 15 *R.* 2. *c.* 6. enacts, That upon every Appropriation, *&c.* the Ordinary of the Place ſhall provide, that the Vicar be well and ſufficiently endowed; ſo as the Power of the Endowment is given to the Ordinary only. But in Regard the Ordinary did not perform that which was the Intent of the Statute (which was alſo defective) it was afterwards provided by the Statute of 4 *H* 4. *cap.* 12. That in every Church appropriated,

propriated, one ſhould be ordain'd Vicar perpetual, and be canonically inſtituted and inducted, and conveniently endowed, by the Direction of the Ordinary: So that it is plain that the Vicar was to be endowed by the Ordinary only. And the Book 40 *E.* 3. 27. ſets down how a Vicar was made by the Ordinary, by the Conſent of the Parſon and Patron. But the Book ſaith, That the Ordinary might do it by the Conſent of the Parſon ſole: And further, That it may be done without Licence from the King; for he takes nothing from the Temporality, but only from the Spirituality: As alſo, That the Ordinary may make Reſtitution to the Parſon again, if the Parſonage ſhall happen to be too poor. And the Difference is there taken by *Mowbray*, when a Layman gives Lands to one who is a Vicar, and when a Vicar is endowed by the Ordinary of the Parſon's Land, *&c.* For in the firſt Caſe the Ordinary hath no Power to diſſolve the Vicarage as to the Land; but otherwiſe in the other. *Vide* 20 *Ed.* 3. *Annuity*, 32. 16 *E.* 3. *Annuity*, 24. and *Br.* 152. *l.* And therefore in Regard the Ordinary might have diſſolved it without the Aſſent of any; the Pope then, who was Supreme Ordinary, might have done it. And he agreed, That to every Appropriation, the Patron's Aſſent and King's Licence are neceſſary; for the Patronage is a Thing Temporal, but the Endowment of the Vicarage, Spiritual, and ſo is the Diſſolving thereof; as it is ſaid in *Grendon's* Caſe. *Plow.* 497. which fully proves this Point, That that which the Ordinary of the Dioceſs might do, the Pope might have done, who had Supreme Juriſdiction over all the Ordinaries;

Ideo fruſtra fit plura per quod fieri poteſt per pauciora. But admitting there ſhould be any Defect therein in this Caſe; yet it is found by the Jury, that in Reputation, it was diſſolved at the Time of the Surrender of the Priory. And it is alſo found, That the Priory received the Profits to their own Uſe; and that at the Time of the Surrender there was not any Vicarage; and that it was then accounted to be diſſolved; which, whether well or ill, is not now to be diſputed; for the Law preſumes, That all Things neceſſary thereto were done, *Concurrentibus hiis quæ in jure requiruntur. Vid. Co. R.* 2. Archbiſhop of *Canterbury*'s Caſe. But it was argued to the contrary on the other Side, and four Queſtions made in the Caſe; Firſt, Whether a Vicarage perpetual may be diſſolved after the Statute of 4 *H.* 4.? And they held, It could not; for the Appropriation makes him to be Vicar perpetual; which runs as well to thoſe which are appropriated, as to thoſe which are not. *Vide le Stat.* The Words whereof be, *Shall from henceforth.* Secondly, Admitting it might be diſſolved; yet, Whether the Pope had any ſuch Power to make an Ordinance againſt this Statute? And it was held, He could not; for he cannot diſpenſe with an Act in the Affirmative. Admitting alſo, That the Vicarage might be diſſolved by the Ordinary, yet the Pope could not diſſolve it; for it appears by divers Statutes, that the Pope had not any Right to meddle with any Advowſons, Benefices, *&c. Vide* the *Stat.* 25 *E.* 3. *cap.* 22. and 22 *Ed.* 3. Of *Proviſion* and *Præmunire. Vide* 30 *Aſſ. pl.* 19. 14 *H.* 4. 14. *N. B.* 64. *E.* and 44 *F.* And in 11 *H.* 4. *Hankford* ſaid, That the Pope's Bulls cannot diſpenſe with the Temporal Law, nor

nor meddle therewith, altho' they tend *in Ordine ad Spiritualia*; as appears 18 *E.* 1. *Munchenſie's* Caſe; *a multo fortiori* then, not with the Statute Law. And in the Statute of 28 *H* 8. *cap.* 16. it is ſaid, That all Diſpenſations, *&c.* from the Biſhop of *Rome*, were void, and of no force, contrary to the Law of the Land; and timorouſly ſuffered, *&c.* Then when the Law prohibits him to meddle with Benefices, he may not diſſolve Vicarages. Thirdly, Admitting all the other, yet this Inſtrument is not ſufficient; for altho' the Rule, *Eo ligamine, &c.* is true; yet herein be not any ſufficient Words for diſſolving, nor any which tantamount, nor ſo much as that the Prior ſhall take the Profits; but only That the Vicar ſhould be governed, and be *ad Nutum Prioris, &c.* Fourthly, The Jury concluding, That if the Plaintiff had Title, then they found for him; if not, then for the Defendant; the Plaintiff here hath not any Title; for the King grants unto him the Rectory or Parſonage; and the Vicarage cannot paſs from the King thereby, as it ſhould do in the Caſe of a common Perſon. 17 *E.* 3. *Grants*, 57. And whereas it was alledged on the other Side, That the Beginning of Vicarages was in the eighth Year of King *John*, *Noy* thereto anſwered, That if their Beginning be known, it was in *Anno* 8 *H.* 3. and for that Purpoſe cited *Hoveden, fol. ult. de vita Willielmi Conq.* And he ſaid, That a Parſonage and Vicarage are two diſtinct Eccleſiaſtical Benefices; and the Parſon and Vicar both have *Curam Animarum*; the Parſon *Habitualiter*, the Vicar *Actualiter*. *Vide* 31 *H.* 6. 14. 17 *E.* 3. 76. 5 *Ed.* 2. *Quare Impedit*, 165. And that altho' the

Vicarage be Spiritual, yet the Corporation is a Thing Temporal, which the Pope cannot diſſolve, as himſelf hath confeſſed; for when he diſſolved the Order of Templers, he ſaid, *Licet hoc de jure non poſſumus, volumus tamen de plenitudine poteſtatis*, which was done in 5 *E.* 2. yet they were not diſſolved here in *England* till the 17 *E.* 2. and then by Authority of Parliament. And a Difference was taken, when a Vicarage is diſſolved into a Parſonage Preſentative, there is not any Loſs or Prejudice to the King; for what is loſt in the one is gained in the other; and they both grow together. But when it is diſſolved into a Parſonage Appropriatory, it is now come *in manum mortuam*; and the King thereby ſhall for ever loſe his Title of Lapſe. And therefore *Trin.* 37. *Eliz. Auſtin's* Caſe. If there be an Union of a Vicarage to a Dean and Chapter, or College, it ought to be with the King's Conſent. *Vid. Temp. R.* 2. *Grants.* 104. 6 *H.* 7. 13. 50 *E.* 3. 26. In an Argument of this Caſe, it was ſaid, That a Donative cannot fall in Lapſe, but the Patron may loſe the Profits thereof if he will: But if any take the Profits from him, he cannot maintain an Action; but he ought to put in his Clerk, and he may maintain the Action. *Vid.* 33 *E.* 3. *Aide*, 107. 6. *H.* 7. 14. 17 *Ed.* 3. 45. And at another Day, in arguing this Caſe, a Caſe was cited betwixt *Parry* and *Banks*, 12 *Jac.* in the Exchequer: A Parſonage was appropriated to the Deanry of *St. Aſaph* in 24 *H.* 8. and a Vicarage endowed; and afterwards the Biſhop, in 24 *Eliz.* diſſolved the Vicarage; and *Parry* pretended that this Vicarage was not diſſolved, but that it was in the King's Hands by Lapſe, and obtained a Preſentation. And it was re-

reſolved by the Barons of the Exchequer, That after the Statute of 31 *H.* 8. which made Parſonages Lay-Fees, the Ordinary may not diſſolve the Vicarage, when the Parſonage is in a temporal Hand; for that ſhould be to deſtroy the Cure: But being in this Caſe appropriated to the Dean, it ſo remaining in his Hand, may very well be diſſolved: And according hereunto was the Opinion of Juſtice *Doderidge*. 2 *Cro.* 515. *Britton v. Wade. S. C.* 2 *Roll.* 97. *S. C. Palmer* 113, and 212. *S. C. Popham*, 144.

Trover for Goods tried at the Bar by a Jury of *Kent*; upon the Trial the Caſe was thus:

Trover lies for Goods taken in Execution againſt one claiming by Deed of Gift antecedent to it.

The Earl of *Winchelſea* in the Month of *Auguſt*, 1689. made his Will, and thereby deviſed to the Plaintiff all his perſonal Eſtate to pay his Debts, *&c.*

The Will was proved:

But immediately upon the Death of the Earl, and before he was buried, the Defendant who was married to the eldeſt Son of the ſaid Earl, took Poſſeſſion of the Houſe and Goods in the Declaration mentioned.

The Plaintiff produc'd the Will under the Probate, then ſhe proved that the Goods were appraiſed at 1800 *l.* She produced an Inventory of them, and proved that they were the ſame contained in the Declarations, ſhe likewiſe gave Evidence of the Converſion.

The Defendant produced a Deed of Gift of theſe Goods made by the Earl in the Year 1650. *habendum* to the Truſtees therein named for the Uſe of his then Lady (but ſince dead) for the Term of her natural Life, and afterwards that they ſhould be and remain to his Children.

The Counſel for the Plaintiff admitted, That tho' the ſame Goods for which this Action is brought, were likewiſe contained in the Deed of Gift, yet that Deed could not be good againſt a Creditor.

That the Earl being in Debt a Judgment was obtained againſt him, and by a *Teſtatum fieri fac.* his Goods were taken in Execution, and ſold by the Sheriff in Hillary Term, 1657. for 800 *l.* which was after this Deed of Gift.

It was proved that his Steward paid the Money, and redeemed the Goods, and the Earl gave him a Bond for Repayment, which was done, and the Bond cancelled; ſo by this Means he had gained a new Property. A Copy of the *Teſtatum fieri fac.* was produced, and likewiſe the Bill of Sale by the Sheriff, and the Bond cancelled, and thereupon the Plaintiff had a Verdict. 4 *Mod.* 51. The Counteſs of *Winchelſea* againſt the Lady *Maidſtone.*

Whether a Bailiff, who takes Goods tortiouſly by Virtue of a *Fieri facias*, can be ſaid to convert them.

An Action of Trover and Converſion was brought againſt a Bailiff for taking Goods by Virtue of a *Fieri facias*, and the Queſtion was, Whether the Bailiff, it appearing that he took the Goods by Virtue of a *Fieri facias*, could be ſaid to be guilty of a Converſion to his own Uſe, admitting that the Goods were not ſubject and liable to the ſaid Execution? 2 *Sid.* 271. *Baily v. Bunning*, S. C. 1 *Lev.* 173.

In Trover the Plaintiff declared, That he was poſſeſſed of divers Goods, *viz.* of fifty pieces of Gold, coined within this Kingdom, *ac de viginti petrat. Carnis Bovinæ*, (*anglice*, twenty Stone of Beef,) *ac de viginti Vaſibus*, (*anglice*, wooden Veſſels) as his proper Goods, which he loſt, *quæ quidem Bona & Catalla poſtea apud*

apud ſuch a Place, *ad manus & poſſeſſionem* of the Defendant *per invention' debuerunt.*

There was a Verdict for the Plaintiff, and entire Damages given. And now it was moved in Arreſt of Judgment, and theſe Exceptions were taken:

1. He hath delared, That he was poſſeſſed of fifty Pieces of Gold coined within this Kingdom, but doth not name what Money it was, for which Reaſon it is incertain; for Pieces of Gold are coined here of ſeveral Values.

Pieces of coined Gold without ſaying what it is.

2. That he was poſſeſſed *de viginti petrat. Carnis bovium.* Now there is no ſuch Word as *petrat*, which ſignifies a Stone of Beef, and there is a proper Word for a Stone-Weight: And the Rule is, when an improper Word is put in the Declaration, for which there is a proper Word to ſignifie the ſame thing, 'tis always held to be naught.

Petrat. carnis, a Stone of Meat.

3. That he was poſſeſſed *de viginti vaſibus*, (*anglice*, wooden Veſſels) the Word *vas* is too general: So *de uno pullo*, hath been held ill for the ſame Reaſon.

Viginti vaſibus, any wooden Veſſels.

4. 'Tis ſaid, theſe Goods *ad manus* of the Defendant *per invention' debuerunt*, inſtead of *devenerunt*; for which Reaſon this is not a good Declaration.

Per invehtionem debuerunt, for *devenerunt.*

Econtra.

It was ſaid, That in the firſt Year of the King, the Plaintiff declared in Trover, that he was poſſeſſed *de una pecia Branditti vini*, and that was held good after Verdict, though there is a proper Word for Brandy. *Adjournatur.* 5 *Mod.* 324. *Salisbury verſus Proctor.*

In

Trover lies for Goods taken under Colour of a Custom, if the Custom is not a good one.

In Trover and Conversion of an Ox-Hide of the Plaintiff in *Middlesex*. The Defendant pleaded, That the City of *London* is an ancient City, and that there is a Custom there that, *si aliquis Extraneus forinsecus e libertate ejusdem Civitatis*, buy any Thing, *de alio forinseco a libertate præd.* that it should be forfeited to the Mayor and Commonalty of the said City, and saith, That the Plaintiff *Extraneus a libertate*, did buy the said Ox-Hide of another Foreigner. Whereupon he seized it in *London*, to the Use of the Mayor, *&c. absque hoc* that he did find it, and convert in *Middlesex*. And it was thereupon demurred. *Glanvil* argued for the Plaintiff, first, That it was not a good and lawful Custom, and in Proof thereof cited the Case 36 *H.* 6. of Jewels of the King's sold, and 21 *H.* 7. 40. 3 *Eliz. Dy.* 186 and 246. And the Form of the Pleading, he said, is not good, *viz. Si aliquis Extraneus a libertate*, but doth not shew where the Liberty is, and the Traverse is not good; for he ought to traverse every County besides *London*, and not *Middlesex* only. *Anderson* and *Beamond* conceived the Form of the Pleading to be ill; but for the Matter of the Custom it self they doubted. *Owen* said, the Custom was good, and had been allowed before their Times. And *adjournatur*. 1 *Cro.* 252. *Samms v. Foster*. See *Moore*, 435. *Hill v. Hawks. S. C.* 1 *Roll. Rep.* 1 *&* 44. *S. C.* 2 *Bulst.* 201.

Trover lies to try the Property of Wood, tho' each Party claimed by Deed under a third.

In an Action of Trover and Conversion of certain Loads of Wood, upon a special Verdict the Case was; Sir *Thomas Palmer* was seised of a great Wood, and bargained and sold to one *Cornford*, and his Assigns, as many Trees as would make 600 Cords of Wood,

to

to be taken by the Aſſignment of Sir *Thomas Palmer*. *Cornford* aſſigns over his Intereſt to the Plaintiff. Afterwards Sir *Thomas Palmer* granted to the Defendant ſo much of his Wood as would make 4000 Cords, to be taken at the Defendant's Election. The Plaintiff afterwards, by the Aſſignment of Sir *Thomas Palmer*, cut down the Trees in Queſtion, to make 600 Cords. And the Defendant claiming them by Virtue of his Grant, took them, and 'twas found, That there was ſufficient Wood left for the Defendant to take his 4000 Cords. *Et ſi, &c.* And upon this Verdict it was moved, That here was not ſufficient Title found for the Plaintiff. For firſt, It is not found, That the Bargain and Sale was for any Sum of Money, nor upon any Conſideration. *Sed non allocatur*; for it is intended to be ſo, being found by the Verdict. But if it had not been ſo found, it might peradventure have been otherwiſe. As 1 *Mar.* 19 *Dy.* is. Secondly, It was alledged, That this Grant to the Plaintiff is void: For, until the Aſſignment made by Sir *Thomas Palmer*, no Intereſt veſted in *Cornford* himſelf, ſo as he could not make any Grant thereof over. But all the Court held the Grant to be good: For being made to him and his Aſſigns, he may make an Aſſignee which ſhall enure as a Nomination to one who is to have by the Appointment of Sir *Thomas Palmer*; and it may well veſt in him, as the Intereſt alſo. And here he hath an Intereſt before the Aſſignment made by Sir *Thomas Palmer*; inſomuch as if Sir *T. P.* will not aſſign it in convenient Time, he himſelf might take them. And therefore he may aſſign this Intereſt, as 44 *Ed.* 3. 43. is. But admitting

ting the Grant to the Plaintiff had been void; yet *Popham* said, That the Action was maintainable; becauſe by the cutting down of them he had Poſſeſſion, and a good Title againſt the Defendant, and every Stranger: And being cut down, it was not lawful for the Defendant to take them: For if one ſells 1000 Cords of Wood, to be taken at the Vendee's Election; and afterwards the Grantor himſelf, or a Stranger, cuts down Parcel of the Wood; the Vendee cannot take that which is cut down: But he ought to make his Grant good out of that which is growing. As if Eſtovers were granted unto him, to be taken in a Great Wood, and the Owner of the Wood cuts down ſome Wood, the Grantee cannot take that which is cut down; but he muſt take his Eſtovers out of the Reſidue. And if all be cut down, he hath not any Remedy, but an Action on the Caſe. So here, altho' the Plaintiff had not a good Title, yet his having Poſſeſſion of them, being cut down, ſufficeth. *Quod Gawdy* and *Clinch* conceſſerunt. Wherefore it was adjudged for the Plaintiff. 1 *Cro.* 819. *Baſſet ver. Maynard.* 5 *Co.* 24. *b.*

Trover lies for Goods to try the Validity of a Deed, and whether fraudulent or not.

An Action of Trover and Converſion was brought, on Not Guilty pleaded, there was found a Special Verdict to this Effect;

Francis Bayle being a Merchant, had made a fraudulent Deed to the Defendant of the Goods contained in the Count; but afterwards he went Abroad to Church, to the *Exchange*; and did trade and commerce. And yet afterwards it is contained in the Indenture of Sale, by the Commiſſioners to the Plaintiff, that he had made this fraudulent Deed; and

that

that afterwards he had traded and ſerved the *Exchange* untill a Day after; at which Day he wholly abſented himſelf. And upon this Special Verdict the Defendant had Judgment. For every Deed to defraud other Creditors (but thoſe to whom this Deed is made) is not ſufficient to make one to be a Bankrupt; it ſhall not bind: But upon the Statute of 1 *Jac.* which makes him a Bankrupt who makes fraudulent Deeds; it ought not to be as this Caſe was; *viz.* So long before he became a Bankrupt. And there were many more Imperfections in the Special Verdict. *Hut.* 42. *Cartwright v. Underhill.* See *T. Jones* 94. *Butler v. Waterhouſe.*

What Deed is fraudulent.

An Action of Trover was brought for Corn; and the firſt Point of the Caſe was, That a Man had a Leaſe in Reverſion, and granted it to another by Fraud; and his Grantee granted that over to Sir *Walter Sands*, *bona fide*. And if this Grant *bona fide*, being derived out of a fraudulent Eſtate, ſhall be void, *per Stat.* 27 *Eliz.* or not? was the Queſtion. *Harris*, Serjeant, It ſeemeth the Grant to Sir *Walter Sands* to be good; and not within the Stat. 27 *Eliz.* For 33 *Hen.* 6. 28. if a Man make a Feoffment in Fee by Colluſion, to the Intent to defraud the Lord of the Wardſhip; and after this Feoffee by Colluſion, make a Feoffment over, *bona fide*, now the Lord is without Remedy; for the Colluſion is gone. And in this Caſe there is an Ignorance in Sir *Walter Sands*, which is not willful; and for that it is not puniſhable: but if the other had taken the Profits, ſo that the Purchaſer might have Notice, there it ſhould be otherwiſe. The ſecond Cauſe was, *Non conſtat.* whether the Grant were before the Statute of 27 *Eliz.*

Trover to try the Validity of a Grant of a Leaſe in Reverſion ſuppoſed to be fraudlent, and therefore void.

or

or not: For if it were before, then the Party ſhall not anſwer the mean Profits. Alſo a third Matter is, Ten Years after, the Term was granted for Money; but when he granted the Reſidue of the Term, and no Conſideration expreſſed, then there ſhall be no Conſideration intended. And if there was no Conſideration given, he is not holpen by the Statute; for that helpeth a Fraudulent Conveyance againſt Purchaſers for Conſideration given or paid. *Et non conſtat* that any thing was paid by the Plaintiff. Alſo it appeareth, That Sir *Walter Sands* was in Poſſeſſion at the making of the Statute. Alſo, here the Party is charged with a Special Fraud. And the other ſaith, That it was made *Bona fide*; and this is a good Courſe of Pleading without any Traverſe. *Per* 4 *Ed.* 4. 24. *Golds.* 118. *Price ver. Sands.*

Trover lies for a Horſe ſtolen and ſold by the Thief under a falſe Name.

In an Action upon the Caſe upon Trover and Converſion of a Gelding, the Caſe was, That one *P.* had ſtolen a Horſe, and ſold the ſame unto the Defendant in open Market, by the Name of *Leiſter*; and the ſaid falſe Name was entred in the Toll-Book. And it was clear by the Court, That by that Sale the Property was not altered. 1 *Leon.* 158. *Gibbs's* Caſe.

Trover brought to try the Validity of a Diſtreſs of the Anchor and Sails of a Ship for Port-Duties.

Trover for his Anchor and Sails: Upon Not Guilty pleaded, a Special Verdict was found, *viz.* That the Mayor and Burgeſſes of *Newcaſtle*, by Cuſtom Time out of Mind, had uſed and ought to repair the Port there; and had in Conſideration thereof, a Toll of 5 *s. per* Chaldron of all Coals exported, to be paid by the Exporter; and for that, by the ſame Cuſtom, he uſed to diſtrain any Thing di-

diſtrainable; and that the Defendant being Maſter of a Veſſel loaded with Coals, intended to be carried out of the ſaid Port, refuſed; and for this they diſtrained the ſaid Anchor and Sails, being part of the Tackle belonging to the ſaid Ship: And if this was diſtrainable, they found for the Defendant; otherwiſe for the Plaintiff. And Mr. *Northey* urged, That the Concluſion of the Special Verdict being upon a Special Point, the Court could doubt of nothing but what was thereby referred to them. *Vid.* 5 *Co.* 97. 1 *Cro.* 21. *Mo.* 261. *pl.* 420. However the Court heard and over-ruled all the other Objections, and held, 1ſt. That it was not neceſſary the Town ſhould ſhew that they actually did keep the Port in Repair; for their keeping the Port in Repair, is not the Conſideration, but their being bound by Cuſtom to do it. 2dly, That tho' the Maſter is not ſtrictly the Exporter, yet as to Port-Duties, the Maſter is always looked upon as ſuch, and the Perſon anſwerable; for to put them to ſeek the Merchants is impracticable; and it but reaſonable the Maſter ſhould pay a Duty for the Benefit of the Port, and that the Town ſhould have the Duty, who are to maintain the Port. As to the Diſtreſs, it was argued, That the Inſtruments of Trade are not diſtrainable; *viz.* a Milſtone is not; *Avaria carucæ* are not; a Horſe in a Smith's Shop cannot be diſtrained; that the Goods ſubject to Toll only can be taken; and this was Part of the Ship, and going from Market. *Vide* 3 *Cro.* 227. *pl.* 14. *Dyer* 199. 1 *Leon.* 231. 105. 3 *Cro.* 550, 569. *Noy* 88. 1 *Inſt.* 47. 1 *Sid.* 341. *Dyer* 312.

On the other Side it was ſaid, *Averia Carucæ* are not privileged where there is no other Diſtreſs. *Vid. Stat.* 51 *H.* 3. 2 *Inſt.* 122, 133, 565. So it is of Inſtruments of Trade; as if there be two Mill-Stones, or *averia otioſa*. *Mo.* 214. *Dyer* 302. *Godb.* 67. *Ow.* 149. A Boat is diſtrainable; *ergo* a Ship, and *ergo* a Sail of a Ship. *Dyer* 177. *pl.* 73.

Sed per Holt, Ch. Juſt. The Duty ariſes from the Goods loaded on board the Ship, with which the Maſter is chargeable; therefore the Ship, and every thing there of the Maſter's, is chargeable as well as the Goods; And the Defendant had Judgment. *Salk.* 1. *Vol.* 248. *Vinkeſtone ver. Ebden.*

Trover lies for Goods tortiouſly taken under colour of an Execution.

In Trover, the Defendant pleaded a Recovery againſt *J. P.* and that a *Fieri Facias* was awarded to the Sheriff; and after the Writ awarded and delivered to the Sheriff, *J. P.* died poſſeſſed of the Goods, and made the Plaintiff his Executor; and afterwards the Defendant, by Force of the Sheriff's Warrant, took theſe Goods in Execution, as Bailiff to the Sheriff, and delivered them to him. The Plaintiff replieth, That the Sheriff returned the Writ *Tarde*; and upon this it was demurred in Law. 1ſt. Queſtion, If the Party dying after the Writ of Execution awarded, and before it was ſerved; if it may be ſerved upon his Goods, in the Hands of his Executors or Adminiſtrators? And it was held, It might: For by the Execution awarded, the Goods were bound, and the Sheriff need not take Notice of his Death. 26 *H.* 7. 5. 6 *E.* 6. *Dyer* 76. 2nd. Queſtion, If the Falſe Return of the Sheriff ſhall make the Bailiff puniſhable for that he did lawfully? for he was a Bailiff

Goods are bound from the *Teſte* of the Writ; and tho' the Party die before the Execution is executed, the Goods may be ſeized.

Bailiff Errant, and a meer Servant to the Sheriff, and not a Bailiff of a Franchise? And it was held clearly, That it should not; for by the Execution by the Bailiff, the Party was discharged of the Execution; and therefore it is not Reason he should take Advantage against the Bailiff; and it was adjudged for the Defendant. 1 *Cro.* 181. *Parkes ver. Mosse. S. C. Moore* 352.

Trover lies to try the Validity of the Sheriff's Sale of Goods on an Execution.

In Trover upon a Special Verdict; the Case was, That a Sheriff upon a *Fieri Facias* seized Goods in his Hands to the Value of the Debt, and paid part of the Debt; and the Goods not being sold, nor the Writ returned, the Sheriff was discharged of his Office; and afterwards sold the rest of the Goods without any Writ of *Venditioni Exponas.* And whether this Sale was good or not? was the Question. And resolved that it was good; for the Writ of *Fieri Facias* gave Aurhority unto him to sell, without any other Writ; and the Sale by him after is good, altho' he were discharged of his Office. Wherefore it was adjudged for the Defendant. 2 *Cro.* 73. *Ayre ver. Aden. S. C. Yelv.* 44.

CHAP. IV.

Of the Declaration.

HAving already, in my Second Chapter, considered the Rules concerning Declarations, with Respect to the Persons by or against whom the Action is brought: We

now proceed to ſuch others as occur in our Books. And ſhall conclude this Chapter with a corrected Precedent of a Declaration, and References to all the Precedents that are to be found in the Books of Entries.

The Converſion is traverſable.

Coke ſaid, It was adjudged in an Action of Trover and Converſion, the Converſion is traverſable; for it is the Subſtance of the Action, and the Tort ſuppoſed in him; and ſo may well be traverſed: For if one finds Goods but doth not convert them, no Action lieth. As the Caſe was in a Trover and Converſion of Goods. The Defendant ſaith he took them Damage-feaſant, and impounded them, *abſque hoc* that he converted them to his Uſe. And in *Leak*'s Caſe it was adjudged, That the Place and Time of Converſion are to be alledged, for they are material; and for that they were not alledged the Bill was abated after Verdict. 1 *Cro.* 97. *Stranſham*'s Caſe. *S Point* 1 *Cro.* 78. *Hubbard*'s Caſe. But the Want of a Place is aided if the Defendant plead a Special Plea; as Sale in Market-Overt, by that a Verdict, and the Statute; becauſe the *Venue* is in the Plea. *Goldſ. Rep.* 54. and 89.

Therefore Time and Place muſt be ſet forth in Bar.

What aids the want of a *Venue*.

But one Place muſt be alledged in the Declaration.

In Trover and Converſion, no other Place is to be expreſſed in the Declaration, but that only where the Gonds came to the Defendant's Hands. 1 *Bulſt.* 206. *Atkins v. Wheeler.*

Need not ſay *ut de bonis propriis.*

An Exception was taken to a Declaration in Trover, That the Plaintiff did ſay he was poſſeſſed of the Things *ut de bonis ſuis propriis.* But the Plaintiff had Judgment. See *Moore* 691. *Maynard v. Battell.*

Error

Error was brought of a Judgment in the King's Bench: For that the Bill, in an Action of Trover, was of 400 Bushels of Pippins, the Declaration was forty Bushels; and Judgment being given upon *nil dicit*, the Writ of Inquiry recites the Trover and Conversion of 400 Bushels. And thereupon Damages found to 40 *l.* and Judgment accordingly. And Errors assigned, because the Writ of Inquiry of Damages varied from the Declaration upon the Record; there being more in the Writ than in the Record upon which the Judgment was entred. The Defendant hereupon alledged Diminution, and procured the Bill upon File to be certified; and then pleaded *In nullo est Erratum*. And all the Justices and Barons held, That it was Error; for the Bill doth not warrant the Declaration; and the Judges ought to be warranted by the Declaration on the Record, and if it be variant from it, is Error; and they said, That it could not be amended; for it is the Record to which the Party was to plead: Wherefore Rule was given for the Reversal of the Judgment; but afterward staid upon a Surmise, that the Record it self was miscertified. 2 *Cro.* 294 *Cleydon ver. Taylor.*

Declaration in Trover ill for varying from the Bill.

'Twas moved in Arrest of Judgment, on the Return of the Writ of Inquiry, That the Time of the Conversion was not alledged; and the Declaration for that Cause was held naught by two Judges. 1 *Brownl.* 8.

Declaration without the Time of the Conversion.

An Action of Trover of Goods was brought, supposing the 3 *May*, 14 *Jac.* he was possessed of the Goods, and the same day lost them; and that 4 *May*, *anno* 14. *supradict.* they came

Of the Time the Trover is to be alledged in.

to the Defendant's Hands by Trover; and that *poſtea*, (*viz.*) *primo Maii anno ſupradict.* he converted them: And it was found for the Plaintiff; and now moved in Arreſt of Judgment, That the Declaration is not good; for the Converſion is alledged before the Trover, which cannot be; and therefore void: *Sed non allocatur*; but it was adjudged, That *poſtea Convertit*, is ſufficient, and the *ſcilicet* is void. And a Precedent was then ſhewn in an *Ejectione firmæ*, where the Ejectment was alledged, That *poſtea ſcilicet*, ſuch a Day, which was before the Leaſe; and it was found for the Plaintiff; for the *ſcilicet* being repugnant is void; and the *poſtea Eject.* was held good enough. Whereupon it was adjudged for the Plaintiff. 2 *Cro.* 428. *Teſmond v. Johnſon. Quære tamen*; for in *Telv.* p. 98. *Wilbore v. Coggan*, in *Aſſumpſit*; the Judgment was for this Exception ſtaid.

Of the Time the Converſion may be alledged at.

In an Action of Trover and Converſion; after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Action was commenced in *Hillary*-Term, and the Converſion alledged to be the 3d of *February* in the ſame Term; and the Bill filed relates to the firſt Day of the Term, ſo before the Cauſe of Action.

But it was reſolved by the Court, That if the Bail was entred after the 3d day of *February*, it is well enough; for it is that which gives this Court Juriſdiction.

So an Ejectment may be brought upon a Leaſe made in the ſame Term: So the Statute of Limitation may be pleaded to an Action, if the Time be elapſed before the Day wherein the Bail is filed, tho' not before the 1ſt Day of the Term, wherein the Action is brought; for

for the Action ſhall not be ſaid to be depending until the Bail is filed. And upon Search it was found, That the Bail was filed the laſt Day of the Term. 1 *Ven.* 135. See 2 *Roll. Rep.* 475. *Lea v. Narſh.* 2 *Lev.* 13, & 176 2 *Sid. Lideot v. Rackwell.*

To an Action of Trover of divers Goods (naming them particularly) and converting of them the Defendant pleaded Not Guilty, and found againſt him, and Damages aſſeſſed to 40 *l.* And it was now moved in Arreſt of Judgment, 1ſt, That the Action is brought of divers Things by an Adminiſtrator of Goods of the Inteſtate's, found and converted: And it appears that Parcel of thoſe Goods are Things fixed to the Freehold, and as Parcel thereof, for which this Action lies not; and divers Parcels of them are inſenſibly alledged, and there be not any ſuch Words in *Latin* or otherwiſe for them; and the Damages being intire, there ought not to be any Judgment: For the Declaration is, That he was poſſeſſed *de duobus Articlis, vocat.* Portal *cum ſuſpenſis, vocat.* Hinges; and *de uno Molendino, vocat.* an Hand-mill; and *de uno Plumbeo, vocat.* a Lead; and *de una Alveola, vocat.* a Waſhing-fat, and loſt them, *&c.* which Things appear to be fixed to the Houſe, and are as Parcel thereof, and not be accounted as Goods; ſo the Action lies not for them: For the Portal is a Door to the Houſe, and the Hand-mill and the Lead, (which is a Brewing Lead) and the Waſhing-fat, (which is Parcel of the Brewing Veſſels) are always fixed Things, and go to the Heir, and not to the Executors, as 20 *H.* 7. is. *Sed non allocatur*; for 'tis alledged in the Declaration, That he was poſſeſſed of

Of the *Latin* Words in a Declaration.

Articlis Portal.

them *ut de bonis propriis*. And it may be theſe Things were ſevered from the Freehold, and Things lying by; and it ſhall be ſo intended when the Plaintiff ſo declares, and the Contrary appears not to the Court by any Matter ſhewn unto them by the Defendant's Plea. *Ollis æreis.* Secondly, For that he declares, *De Quatuor ollis æriis, vocat.* Braſs-pots, where it ought to be *Ollis aheniis*; for there is not ſuch a Word as *Æriis*. *Sed non allocatur*; for when it is added, *vocat.* Braſs-pots, that is as much as to ſay, *Anglice*, Braſs-pots, which the Court knows was intended; which altho' it be not in congruous *Latin*, or in apt Words for it, yet it is good enough, and of ſuch Nature were divers other Things in the Declaration; but they had all one Anſwer. Thirdly, Becauſe he declares, That he was poſſeſſed *de uno Spadone, una equa pretii*, 53 s. 4 *d.* So there is not any Price at all for the Gelding; and for that Cauſe *Popham* and *Yelverton* held, the Declaration to be ill; for to every Thing there ought to be added the Value, if it be a dead Thing, and the Price, if it be alive: And foraſmuch as this wanted thereof, they held it to be vicious. But *Williams*, *Tanfield* and *Fenner*, *contra*; for they ſaid it was not of Neceſſity, eſpecially where the Thing is not demanded, but Damages for it. And therefore *Williams* cited the Regiſter, *fo.* 37. That ſuch Exception at the Common Law was not material. But they held, That at the moſt it was but Default of Form, which is aided by the Statute of 18 *Eliz.* But the other Juſtices denied it, and ſaid, It was Subſtance, and not Form only. But afterwards upon viewing the Roll in Court, altho' the Record of *Niſi Prius* was ſo, yet

Whether a Declaration is ill for want of the alledging the Value.

yet the Roll is *de uno Spadone & una Equa pretii*, 53*s.* 4*d* ſo the Price extends to both: Wherefore they held it all to be good enough. Wherefore they awarded the Record of *Niſi prius* ſhould be amended according to the Roll; and it was adjudg'd for the Plaintiff. *Note*, There was a Precedent cited. *Trin.* 23 *Eliz. Rot.* 723. That for wanting *vi & armis*, in Treſpaſs, it was reſolved to be but Form and not Subſtance, and aided by 18 *Eliz. Noy* 115. 2 *Cro.* 129. *Wood verſus Smith.*

Of ſhewing the Value of the Goods in Trover.

The Value of the Goods in Trover need not be preciſely alledged; *aliter* in Detinue: The Reaſon of the Diverſity is, becauſe in Detinue, the Things themſelves, or the Value of them, is to be recovered; but in Trover only Damages. Adjudged on Writ of Error. 2 *Roll. Rep. Goodwin v. Harwood.*

In a Declaration of Trover, need not ſay whether linen or woollen.

A Writ of Error was brought to reverſe a Judgment, given by Default in the Common Pleas, in an Action of Trover and Converſion, and the Error aſſigned was, That the Plaintiff had declared for two Pieces of Cloth, and did not expreſs whether they were linen or woollen Cloth; but the Exception was over-ruled, and the Judgment affirmed. *Niſi, &c. Style*, 419. *Iles* and *Winſor.*

The expreſſing the Colours in *Engliſh*, tho' they are not expreſſed in *Latin*, ſhall not viriate a Declaration.

It was moved in Arreſt of Judgment, That the Plaintiff had declared of the Trover and Converſion of a certain Number expreſſed in the Declaration of Pieces *panni lanei, anglice*, of red, yellow, and black Cloth; which is incertain, and cannot be uſed as it is here, to expreſs Cloth of divers Colours; for *panni lanei* ſignifies only woollen Cloth. But *Barn*, Juſtice, ſaid, All is but woollen Cloth, though they be of divers Colours, and therefore it is good enough. *Hodſden*, the Secon-

In Trover for Cloth, the Colours need not be expreſſed.

dary, ſaid, Sometimes the Colours are uſed to be expreſſed, and ſometimes not. *Bacon*, It is better to expreſs the Colours than not; yet it is good enough without the expreſſing of them. Therefore let the Plaintiff take his Judgment. *Style*, 75.

How to declare in Trover for a Bond.

Action in Trover and Converſion, for that the Plaintiff, 9 *Martii* 18 *Jac. apud Chelmsford*, was poſſeſſed of a Writing obligatory, wherein *John Petchy* and *Thomas Petchy* were obliged to the Plaintiff in 60 *l.* ſealed with the Seals of the ſaid *John Petchy* and *Thomas Petchy*, *Ut de ſcripto ſuo obligatorio proprio, & ſic poſſeſſionatus*, 12 *Martii*, 18 *Jac.* loſt it. And that upon the 13 *Martii*, 18 *Jac.* at *Chelmsford*, it came to the Defendant's Hands by Trover: And that the Defendant 20 *Martii*, 18 *Jac.* at *Chelmsford* aforeſaid, converted it to his own Uſe. Upon this Declaration, the Defendant demurred in Law, becauſe the Date of the Bond is not mentioned; nor that it was delivered as their Deed; but without much Argument it was adjudged for the Plaintiff; for he needs not ſhow the Date, becauſe it is loſt, and the Defendant hath eſloined it. And he is not to recover the Debt, but Damages. Therefore ſecondly, the Allegation that it was *ſcriptum obligatorium*, wherein they were obliged, hath Intendment ſufficient that they delivered it as their Deed. Wherefore, *&c.* 2 *Cro.* 637. *Upchard verſus Tatam.*

How to declare in Trover for a Bond.

Error of a Judgment in the Common Bench. Upon Trover and Converſion of a Bond of 100 *l.* conditioned for the Payment of 50 *l.* at ſuch a Day; which came to the Defendant's Hands, and he being required ſuch a Day and Year to deliver it, had not delivered it, but re-

refuſed and converted it to his own Uſe. (but no Day, Year, or Place of this Converſion mentioned) The Defendant pleaded Not guilty, and found againſt him, and Judgment for the Plaintiff. The firſt Error aſſigned by *Grimſton* was, becauſe the Date of the Bond is not mentioned; *ſed non allocatur*; for being loſt and converted, he peradventure did not know the certain Date of the Bond, and if he ſhould recite a Date, and miſrecite it, it would be a Failer of his Suit. The ſecond Error, becauſe he did not alledge the Day nor Place of the Converſion; *ſed non allocatur*; for the Denying to deliver upon Requeſt is a Converſion; and the Day, Year, and Place are thereby alledged, which is ſufficient: And the Allegation of the Converſion (which hath no Day, nor Place) is not material, when there was a ſufficient Converſion before; whereupon the Judgment was affirmed. 2 *Cro.* 262. *Wilſon verſus Chambers.*

In Trover and Converſion for a Mare.

Upon Not guilty pleaded, and a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Mare was laid *ad valentiam*, and it ſhould have been *pretii*. *Sed non allocatur*, after Verdict, (2 *Cro.* 207. *Style*, 174, 182, 2.)

Ad valentiam, inſtead of *pretii*, is good after Verdict.

The Plaintiff declares, That he was poſſeſſed *de quadam equa ut de catallis ſuis propriis*, and that *catalla præd. caſualiter perdidit*, and that coming to the Defendant's Hands, he converted *catalla prædict.* to his own Uſe; ſo that there is no expreſs Converſion of the Mare.

The Court ſaid, That the Declaration was inartificial, but good after Verdict; for *Catalla prædict.* muſt refer to the Mare; for nothing elſe is mentioned before. 2 *Ven* 174.

So is *Catella prædict.* tho' there was only a Mare mentioned.

In

Et bona & Catella, where nothing but a Waſtcoat on general Demurrer.

So is *Bona & Catalla prædict'*, tho' there was only a Waſtcoat mentioned, good on general Demurrer. tho' perhaps 'twould be ill on a ſpecial one. See *Lutw.* 1537. *Allen v. Harris.*

Sex Catellis & una Amphora ſaporis.

In an Action of Trover for divers Things, *& inter alia de ſex Catullis quatuor Catellis & una Amphora ſaporis*, after Verdict for the Plaintiff, 'twas moved in Arreſt of Judgment, That *Catulis* ſignifies Whelps, *Catellis* little Whelps of any kind, and that *ſaporis* ſignifies Savour, for which no Action lay; but the Court gave Judgment for the Plaintiff, and ſaid, they would intend the Whelps were Dogs Whelps, and that no Damages were given but for the *Amphora*. 3 *Lev.* 336. *Chambers v. Warkhouſe. Sed quære*; for this Caſe does not ſeem to be Law. *Vide* the following Caſes.

Duobus centenis plumbi uræ, with an *anglice*, is good.

Trover *de duabus Centenis plumbi uræ, anglice*, two hundred Weight of Lead Ore.

Centena is to be underſtood according to the ſubject Matter.

It was objected, That *Centena* ſignifies an Hundred in a County, and 'tis uncertain hereof what it ſhould be underſtood; but the Court ſaid it was good with the *anglice*, and to be underſtood by the ſubject Matter. Trover *de duobus ponderibus Caſei, anglice* two Weighs of Cheeſe, hath been held good; ſo *de duobus oneribus Cupri, Anglice* two Horſe-Loads of Copper. 1 *Ven.* 211.

Sex parcellis plumbi Anerii, anglice, pewter Porringers, is good.

In Trover and Converſion for divers Parcels of Houſholdſtuff, an Exception was taken to the Declaration, becauſe the Plaintiff, amongſt other Things, had declared, *pro ſex parcellis plumbi Anerii, anglice*, Pewter Porringers: Whereas the Word *Parcellis* is uncertain; for a Parcel doth conſiſt of many Things in

Number, and ſo *ſex parcellis* cannot properly be applied to ſix Porringers; but if it had been *ſex peciis*, it had been better, tho' that be alſo incertain. *Hale* held it was all one as if it had been *pro ſex peciis plumbi Cinerii*. *Rolle*, Chief Juſtice, inclined it was well enough, becauſe though the Words are not ſo proper, yet the Deſcription is good enough. *Jerman*, Juſtice, was of the ſame Opinion. But *Nicholas*, Juſtice, That the *Latin* is not good; for if there be proper Words for a Thing, they ought to be uſed, otherwiſe Barbariſm will be induced; and Circumlocutions ought not to be uſed where there is a proper *Latin* Word to be had to expreſs a Thing. *Ask*, Juſtice, agreed with *Rolle* the Chief Juſtice, and the Plaintiff was bid to take his Judgment, except better Matter were ſhewn to the contrary. *Style*, 199. *Graves* againſt *Drake*.

Where there are proper Words for a thing, they ought to be uſed, not barbarous Words or Circumlocutions.

In an Action of Trover and Converſion the Plaintiff had a Verdict; The Defendant moved in Arreſt of Judgment, and took theſe Exceptions to the Declaration: 1. The Plaintiff declares *pro tribus duodenis fili, anglice* Dozens of Thread, which is uncertain; for it may be three Dozen Pound of Thread, or Skenes of Thread, or Ounces of Thread. To this it was anſwered, That it cannot be otherwiſe expreſſed, and the Word Dozens of Thread is uſed amongſt Merchants, and well known unto them what is meant by them. 2dly, He declares for ſo many Pounds of Muſcat, inſtead of *nucum Muſcatarum, anglice* Nutmegs. But this Exception was miſtaken, for the Record was otherwiſe; and beſides, it was with an *anglice*, which makes it certain. The Court ruled Judgment to be entered, except

Trover *pro tribus duodenis, anglice* Dozens, is good.

cept Cauſe ſhewed, for the Plaintiff. *Style*, 80. *William* againſt *Tyrer*.

Declaration *pro ducentis ponderibus Medicamenti*, with an *Anglice*, good after Verdict.

Ernely brought an Action of Trover and Converſion againſt *Allen*, for taking away, and converting to his own Uſe, divers of his Goods and Chattels; and amongſt other he declares for the Trover and Converſion *de ducentis ponderibus, Anglice* Weights, *Medicamenti, Anglice* Drugs; the Plaintiff had a Verdict and a Judgment, and entire Damages given for all the Things laid in the Declaration. The Defendant brought a Writ of Error to reverſe this Judgment, and aſſigns for Error, That the Words *de ducentis ponderibus, Anglice* Weight, *Medicamenti, Anglice* Drugs, mentioned in the Declaration, are incertain; and ſo the Damages being given intire for all, it was not good. *Wadham Wyndham*, Counſel with the Plaintiff in the Writ of Error, held the Words to be incertain, both in Reſpect of Quantity, as alſo in Reſpect of the Quality or Nature of the Drugs; for the Word *Pondus* may ſignify a Pound, an Ounce, a Dram, a Scruple, or any other Weight, ſo that the Weight cannot be known; and the *Anglice* Weight is as incertain as the *Latin* Word: Pound for Weight may ſignify as many different Weights as the *Latin* Word *Pondus*: But it might have been otherwiſe, if it had been *Anglice* a Stone, or a Weight, which were Words certainly known what they mean; but here a Weight of Drugs is not underſtood by the Drugſters. And ſo the Words ſhall not be ſaid to void, ſo that there be no Damages for them; for the Words are not like to the Words *duodecim duodena fili*; for they are Adjective Words, but the Words here are Subſtantive, and ſignify by themſelves. And

A Difference betwixt Adjective Words, and Subſtantive ones.

the

the Word *Medicamentum* alſo is as uncertain as the other Words, and the *Anglice* Drugs, doth not make it more certain; for a Drug is of as incertain Signification as the Word *Medicamentum*; for all Vegetable Creatures, and Extractions out of them, as alſo out of the living Creatures, made uſe of in Phyſick, either by themſelves, or elſe compounded one with another, are called Drugs; and ſo he prayed that Judgment might be reverſed. *Maynard*, on the other Side, ſaid, That the Words join'd with the *Anglice* were certain enough, for *Pondus* ſignifies a Weight, which Word is well and commonly known amongſt the Drugſters, how much it contains: And he cited one *Penny*'s Caſe, where *decem ponderibus*, without an *Anglice*, was held good; and one *Wardner*'s Caſe, 21 *Jac.* in this Court. Next for the Word *Medicamentum*, being join'd with an *Anglice*, it is a good Word to expreſs Drugs, for of it ſelf it is no *Latin* Word to ſignify any certain Thing; and here is no Incertainty in the Matter, for it may be brought to a Certainty to the Jury's Underſtanding, and it is not neceſſary to expreſs the Matter like a Scholar, or a Philoſopher, but only as they are known by Tradeſmen, according to common Underſtanding. And in an Action brought amongſt other Things for a Library of Books, which is more incertain, Judgment was given for the Plaintiff; and *Melhuis*'s Caſe, where the Declaration, *inter alia*, was *Pro decem ponderibus ferri*, ten Tuns of Iron, was agreed between the Parties: And *Lawrence* and *Turner*'s Caſe, *Mich.* 23. *Jac.* in Trover and Converſion, *Pro tribus ponderibus Lani*, was naught, becauſe it was without an *Anglice*. Serjeant *Glyn* argued

Drug, *quid.*

Decem pondéribus, without an *Anglice*, good.

What Certainty requiſite in a Declaration.

Trover for a Library of Books, held good.

to

Pro decem penderibus, Lani, is naught without an *Anglice*.

to the ſame Effect, on the ſame Side. *Hale*, on the other Side, ſaid, That notwithſtanding the *Anglice*, the Declaration was incertain. And it is not like the Caſes *De tribus ponderibus, Anglice* Weights of Cheeſe, or Salt, or Stone-weight of Cheeſe: And the Word *Medicamentum* is as uncertain as the other Word; for it ſignifies divers Species of Things. But *Rolle*, Chief Juſtice, held, That the Drugs were well expreſſed by the Words in the Declaration in the vulgar and uſual Acceptation of the Words; and for the Word *Weight*, it is alſo well known amonſt Tradeſmen. *Nicholas*, Juſtice, ſaid, We muſt not frame Niceties to overthrow Judgments; and here is Certainty enough in both the Words to deſcribe the Thing; and it is impoſſible to deſcribe them aptly and particularly. *Rolle*, Chief Juſtice, ſaid, The Declaration is two Hundred Weight; and every one knows the Meaning of a Hundred. *Jerman*, Juſtice, held the Declaration certain enough; and cited a Caſe, where one declared, *Pro decem doliis Spirituum, Anglice* ten Hogſheads of Spirits, and adjudged good. *Aſh*, of the ſame Opinion; and ſo the Judgment was affirmed, *niſi. Style* 224. *Ernely* againſt *Allen*.

Medicamentum, Anglice Drug, good.

Ponderibus, Anglice Weight, is good.

Declaration *pro decem, doliis Spirituum* with an *Anglice*, is good.

Error of a Judgment in the Common Bench, in an Action of Trover and Converſion of 300 *Todas Lanæ*. The Defendant pleaded Not Guilty; and it was found againſt him to his Damages of 300 *l.* and Judgment for the Plaintiff. The firſt Error aſſigned was, Becauſe *Todas* is no *Latin* Word, *Anglice vocat.* Tods; and therefore the Court cannot adjudge thereof, being inſenſible: *Sed non allocatur*; for it is a framed Word to that Purpoſe, to ſhew the Intent of the Parties, altho' it be not a proper *Latin* Word; and in the *Regiſter, fol.* 110,

Todas Lanæ. with an *Anglice*, is good.

111,

111, there is *pipam vini, Barrel' Cerveſia.* And the Books of *Entries*, 17, & 201. And there was ſhewed a Precedent 12 *H.* 7. for this Point, *Tod. Lanæ*; and Judgment for the Plaintiff. A ſecond Error aſſigned, Becauſe it is alledged *pretii, &c.* where it ought to have been *ad valentiam*: *Sed non allocatur*; for it is good both ways. Thirdly, Becauſe the Writ Original was *de quibuſdam bonis & Catallis*, and doth not ſhew any at all in the Writ; *ſed non allocatur*: For the Difference is, where a Writ is brought for one Thing only, there Mention is made in the Writ, of the Nature of it; but when the Demand is of divers Things, for the Brevity of the Writ, it is *de quibuſdam bonis & catallis*, and ſo expreſs the Certainty of them in the Count. In the ſame Manner it is in Treſpaſs; and ſo are all the Precedents. Fourthly, For that *Venire Facias* is awarded *de Viceneto Civitatis Coventriæ*, which ought not to be; for *Civitat. Covent* being in the Margent, is intended the County: Therefore as a *Venire Facias* ought not to be from a County, ſo it ought not to be from a City; and thereof the Court much doubted, and cauſed a Search to be made of the Precedents in the Common Bench, and King's Bench for this Point; and upon View of Precedents in all Places beſides *London*, no Mention is made of the Pariſh or Ward; and all *Venire Facias's* are awarded, *de Vicenet. Civitat.* which is intended as well as *de Civitat.* it ſelf; as *de Viceneto infra Juriſdictionem* of the City; and ſo it is *de Viceneto Eborum, Norwich, Sarum, Briſtol, Exon*, and all other Cities which are Counties within themſelves: And this Exception was taken in the Common Bench; and upon Adviſements, they reſolved it to be good enough; and ſo was done; and the

the Judgment affirmed. *Vid.* 7 *H.* 4. 13. 8 *H.* 5. 10. 10 *Ed.* 3. 27. 10 *H.* 6. 19 *Co. l.* 6. *f.* 14. *Arundell's* Case. 2 *Cro.* 307. *Amyas Cliſon ver. Proctor.*

Declaration in Trover for Books and Stockings is good without ſhewing what the Books were, or of what the Stockings were made.

In an Action of Trover and Converſion, and a Verdict for the Plaintiff; it was moved in Arreſt of Judgment, That the Plaintiff did declare for Books and for Stockings found and converted, and doth not ſhew what Books, *viz.* Whether *Engliſh* or *Latin*, or what other Language; nor, whether Law-Books, Divinity, Phyſick, or any other Subject; and becauſe he did not declare what Sort of Stockings they were, whether Woollen, Worſted or Silk, *&c.* But the Court over-ruled the Exceptions; and ſaid, That Books were not Things of divers Species, be they of what Language or Subject they may be of: Neither the Stockings; for were they Silk, or Woollen, or Worſted, they were but Stockings; and ſo ruled Judgment to be entred. *Style* 25. See 1 *Bulſt.* 126.

and why.

Riſcus, a Trunk full of fine Linen, and *Pixis*, a Box full of Bands and Cuffs.

An Action of Trover and Converſion of divers Goods, *& inter alia de uno Riſco, Anglicè* a Trunk-full of Fine Linen, *ad valentiam* 20 *l. & de una Pixide, Anglicè* a Box full of Bands, Cuffs and Shirts, *ad valentiam* 10 *l.* and of divers Parcels of other Goods. The Defendant pleaded Not Guilty, and Verdict found againſt him, and entire Damages aſſeſſed to 80 *l.* And it was moved in Arreſt of Judgment, That this Declaration is not good; for *Riſcus* is but a Trunk only, and *Anglicè* full of fine Linen is uncertain; and Damages were given upon that Uncertainty. And it was ſaid, That this Caſe differs from *Osbourn* and *Middleton's* Caſe. *Co. l.* 18. *f.* 130. For there *Fulcrum lecti* may

may be conſtrued and underſtood of all that appertains to the Furniture of a Bed; but *Riſcus*, with an *Anglicè* full of Linen, cannot be intended to be underſtood, and referred to Linen; and if it ſhould be referred, 'tis uncertain; and if it ſhould not be referred to Linen, it was never intended that 20 *l.* ſhould be for the Value of the Trunk; and therefore it is not good, as *Playter*'s Caſe. *Co.* 5. *fo.* 34. *Treſpaſs, Quare Piſces ſuos cepit*, is not good for the Incertainty. And of that Opinion was *Houghton*; for if he had ſaid, *de Riſco, Anglice* a Trunk full of Gold to the Value of 5000 *l.* and Damages had been given accordingly; none will ſay, That it was for the Trunk only, but the Gold therein; which had not been good for the Incertainty. But *Lea*, *Doderidge* and *Chamberlain*, held it to be good, and that Damages ſhould be intended to be given for the Trunk only; wherefore it was adjudged for the Plaintiff. *Note*, A Writ of Error was brought of this Judgment; and this Judgment affirmed. 2 *Cro.* 664. *Bancroft verſus Coo.*

Is good, and why.

But 2 *Roll. Rep. p.* 254. *Bancroft*'s Caſe 'tis doubted, Whether *un. Riſcus, Anglice*, a Trunk full of Linen, *una Pixis, Anglice* a Box full of Linen, were good.

In Trover and Converſion for divers Goods, the Defendant pleaded Not Guilty; and upon Iſſue joined, a Verdict was found for the Plaintiff. It was moved in Arreſt of Judgment, That the Plaintiff, amongſt other Things, had declared for a Trunk with Writings, which is uncertain.

A Declaration for a Trunk with Writings, good.

Wadham Wyndham, for the Defendant, ſaid, The Declaration was certain enough; and cited a Caſe where an Action was brought

for two Trunks of Cloaths, and doth not ſay, what Cloaths, and yet adjudged good. Another Exception was taken, That the Plaintiff declares for a great Beam, Scales and Weights, which is alſo incertain. To this *Wyndham* anſwered, It is certain enough; becauſe they all make but one Thing, by reaſon of the Relation they have one to the other; and in the old Book of *Entries*, we find, That an Action of Treſpaſs was brought *pro Caruca cum apparatu*, and adjudged good. *Latch*, on the other Side, as to the laſt Exception, ſaid, It is not anſwered, for the Words are very incertain; and it is not like the Caſe of the Treſpaſs cited, *de Caruca cum apparatu*; for the Weights go not to the perfecting the Beam, as the *Apparatus* doth of the Plow; and it is as uncertain as to bring an Action for five Locks and Keys, which is not good. *Hale* anſwered, it is certain; for it is all one as if he had ſaid a Beam, Scales, and Weights, which is as certain as to ſay, a Ship with Anchors and Cables. *Rolle*, Chief Juſtice, How can we reduce the Weights to any Certainty, as the Declaration is laid? And if the Word *and* had been added, it would not have helped; for they may be a Hundred Weights, or a Thouſand. Another Exception was taken, That the Plaintiff in another Action had declared for four Pair of Hangings, which is uncertain: But *Rolle*, Chief Juſtice, ſaid, That that might be well enough underſtood. *Green*, at another Day inſiſted, That four Pair of Hangings is very uncertain; but if it had been ſaid four Suits, it had been well: Beſides, the very Word Hangings is a doubtful Word; for it ſhews not whether the Hangings were Silk or Stuff, or what elſe they were made of;

So of Beams, Scales, and Weights, becauſe they make *unum totale*.

as

as it ought to be. He also took an Exception, That the Plaintiff had only shewed that here was a Denial and Refusal to restore the Goods, but no Conversion of them is shewed. To this *Hale*, answered, That the Action being an Action on the Case, it is not necessary to shew the Conversion; and for the four Pair of Hangings is well enough; for a Pair is a Couple, when the Word is used of dead Things, and not like a Pair of Tongs, which makes but one Thing; nor is it material to express of what the Hangings are made; as it is not in an Action brought for divers Pair of Stockings, material to say, Whether they were of Thread, Silk, Worsted, or Woollen, as hath been adjudged; and the Word Hangings is certain; for any one will conceive them to be meant of the Hangings of a Room. *Rolle*, Chief Justice, The Action is an Action of the Case; and it is not necessary to shew a Conversion; and if so, if a Demand and a Denial be proved, doth not this prove a Conversion? As an Action of the Case lies for keeping one out of Possession, altho' the Party doth enter afterwards; and the four Pair of Hangings is certain enough, and it is not like as where *Latin* Words are mingled with *English* in a Declaration; and the Words being taken in the *English* Construction shall be understood to be eight Hangings. Nor is it material to express of what the Hangings are made. But the great Doubt is, Whether the Words be meant of Hangings for a Room, or not? And I suppose they cannot be meant of other Hangings, the Words being in *English*, and not in *Latin*, with an *Anglice*; and I believe you cannot shew me any thing else that the Words can

by common Intendment ſignify. *Judicium niſi.*

The Caſe was again moved at another Day, by *Latch*, who argued, That four Pair of Hangings were Words incertain; but if it had been four Suits, it had been well; ſo that here is a Miſaplication of Words to expreſs the Thing meant, and he might as properly have ſaid a Suit of Shoes, or a Suit of Conies. If one ſay he hath loſt a Hanging, this is incertain of it ſelf; for it is the Predicament of *Situs*, and not of Subſtance: For a Hanging is a Poſture, and the Word Pair makes it more incertain than it was without it. *Hale* anſwered, That it was certain enough; for the Word Hanging is uſed here Subſtantively, and not as a Particple, and the common Uſe of the Word is only applicable to the Hangings of a Room; and the four Pair of Hangings ſhall be underſtood eight Hangings. *Rolle*, Chief Juſtice, A Pair is properly when one of theſe Things ſo called, cannot properly be uſed one without the other; but yet the Words may be alſo underſtood ſo many Couple, and here you cannot intend the Words to mean ſo many Suits of Hangings; and you might have expreſſed your Meaning by ſo many Pieces of Hanging; and therefore it ſeems doubtful. *Jerman*, Juſtice, Here the Words do not expreſs the Number of the Things, as they do when you ſay a Pair of Oxen, or the like. *Nicholas*, *Jerman*, *Aſh*, Juſtice, A Pair is incertain; for that Word may be meant two in Number, as when you ſay a Pair of Cards; and a Pair of Hangings in ſome Places is meant a Suit of Hangings. *Rolle*, Chief Juſtice, If it be ſo, then it is more incertain; the Word Hangings may be good enough; but

But four Pair of Hangings ſeems to be ill for the Uncertainty.

but how can the Number be known? Afterwards the Court moved the Defendant to ſuffer the Plaintiff to amend his Declaration, and to plead a-new, and conſent to a new Trial. *Style* 360. *Webb* and *Waſhborn*.

In an Action of Trover and Converſion *de decim paribus velorum & tegularum, Anglice*, Curtains and Vallens: 'Twas moved in Arreſt of Judgment, That the Declaration was uncertain, becauſe it did not appear how many there were of the one, or how many of the other, nor what was meant by a Pair; but Judgment was given for the Plaintiff contrary to the Opinion of *Twiſden*, who relied upon the preceding Caſe. 2 *Sid.* 445. *Taylor v. Wells. S. C.* 2 *Saund.* 74. And with this Opinion agrees the Judgment in the Caſe of *Feeke* and *Ward*. 1 *Sid.* 174. But in 1 *Vent.* 71. *Anonymus*, which ſeems to be the Report of the abovementioned Caſe of *Taylor* and *Wells*, 'tis ſaid, 'twas adjudged to be ill. *Ideo Quære.* *De decem paribus velorum & tegularum.*

Upon a Verdict found for the Plaintiff in a Trover and Converſion; the Defendant in Arreſt of Judgment took Exceptions to the Declaration, becauſe the Plaintiff had declared of a Trover and Converſion, *de decem arboribus*, whereas the Trees were Timber-Trees that were felled, and they are not well expreſſed; for the Word *Arbor* properly ſignifies a Tree that grows, and not one cut down; according to the old Verſe, *Arbor dum creſcit, lignum dum creſcere neſcit*, and ſo a Trover cannot be brought, *pro arbore*. But *Rolle*, Chief Juſtice, ſaid, That they were well enough expreſſed by the Declaration; and that they ought not to be ſo ſtrict in Scanning ſome Words where the Thing is well deſcribed. *Style* 232, 235. *Popham* againſt *White*. A Declaration in Trover *de decem Arboribus*, is good.

Sex Bovibus inſtead of *Bobus*, is good, becauſe the Word occurs in *Plautus*.

In Trover and Converſion, amongſt other Things the Plaintiff declared *de Sex bovibus*, inſtead of *Bobus*; upon Not Guilty pleaded, and found for the Plaintiff, and entire Damages aſſeſſed, it was moved in Arreſt of Judgment, That the Jury ought not to have given any Damages; for the Word *Bovibus*, being a Word inſenſible, and intire Damages being given, it was naught for all. To which it is anſwered, That if the Word be inſenſible, notwithſtanding the *Anglice*, the Jury ſhall not be intended to have regarded it in giving of Damages; and if it hath a Signification, then it is well enough: And it was ſaid, *Bovibus* was an old *Latin* Word, and is found in *Plautus*; and 'tis *Bobus* only by Contraction. It was alſo ſaid, That the Plaintiff brought this Action as Executor, and the Trover was laid in the Teſtator's Time, which was not ſufficient; tho' the Converſion was alledged in his own.

Where a Word is inſenſible, notwithſtanding the *Anglice*, nodamages ſhall be intended to have been given for it.

Trover in the Teſtator's Time, and Converſion in the Executor's, yet good.

But the Court held neither of theſe Exceptions ſufficient to arreſt Judgment.] 1 *Ven.* 17.

Declaration *de uno Vaſe*, without ſaying of what the Veſſel was made, is good on Demurrer,

In a Trover and Converſion brought by the Plaintiff, as Aſſignee of Commiſſioners of Bankrupts, amongſt other Things he declared, That he was poſſeſſed *de uno Vaſe*, *Anglice* a Veſſel, *Vini Hiſpanici*; and it was objected upon a Demurrer to the Declaration, That it was not ſaid what the Veſſel was made of; and ſo no Meaſure for the Damages: *Sed non allocatur*; for it is intended to be made of Wood, as is uſed for Casks for Wine. 2 *Ven.* 67. *Bloſſe v. Froſt.*

Trover

Trover and Converſion *de tribus Struibus fœni, Anglice* Ricks of Hay. 'Twas moved in Arreſt of Judgment, That it is too uncertain; for no Man could tell how much was meant by *Strues*. It was argued it ſhould have been ſo many Cart-Loads, or the like; for Loads was adjudged uncertain in *Glyn*'s Time here. But *Rainsford* and *Moreton*, who only were in Court, judged it well enough. 1 *Mod.* 289. *Wood verſus Davis.* S. C. 1 *Lev.* 301.

Trover *de tribus Struibus fœni* is good.

Action *ſur* Trover of divers Goods, and *inter alia de decem Capſis & Ciſtis, Anglice* Cheſts and Coffers, and of a Bag, and 20 *l.* therein. The Defendant was found Guilty, *de Quatuor Ciſtis & Capſis*, and of 13 *l.* Parcel of 20 *l.* and of divers other particular Parcels; and of the Reſidue Not Guilty. And Exception was taken in Arreſt of Judgment, That the Declaration was, that he converted *decem Capſas & Ciſtas*, and doth not ſhew how many Cheſts, or how many of Coffers, was incertain and ill; and therefore the Verdict was alſo ill. But the Juſtices *Gawdy* and *Fenner* held them to be all one. But if Cheſts and Coffers ſhould be ſaid to be diſtinct Things; it ſhould then be ill. Secondly, It was moved, That this Trover and Converſion of Money out of a Bag, cannot be good, becauſe it cannot be known; and when he is found Not Guilty of the Bag, and Guilty of the Money; that is as much as if he had declared of the Trover and Converſion of Money out of a Bag, which was ruled to be ill in *Hicks* and *Holiday*'s Caſe. But they held, That an Action of Trover and and Converſion of Money only was good enough, and an Action well maintainable for it; wherefore *Cæteris abſentibus*, it was adjudged for the Plaintiff. 1 *Cro.* 818. *Draycot v. Piot.*

Nav' de decem Capſis & Ciſtis.

Good, becauſe all one, and not diſtinct Things.

So of Money out of a Bag.

A Declaration for ſeveral Things well expreſſed, *cum aliis Implementis*, is ill.

In Trover of Goods. The Defendant pleaded not Guilty, and found againſt him; and it was now moved in Arreſt of Judgment to be an ill Declaration; for he counts that he was poſſeſſed of ſuch Goods, ſhewing what they were *in Specie cum aliis Implementis ad valentiam*, 3 *l.* but expreſſeth not what they were; and that he was poſſeſſed of other Parcels (particularly declaring what) *cum aliis Neceſſariis*; but mentions not what they were; and that he was poſſeſſed *de ſuibus*, but doth not ſet forth their Number. The Defendant, by Verdict, was found guilty of all contained in the Declaration, and Damages intirely aſſeſſed for all, which being ſo incertain, the Court cannot give Judgment for thoſe Parcels which are incertain. And of that Opinion was the whole Court for the Incertainty in the Declaration. But *Gawdy* held, That in Regard the Defendant had admitted it, he cannot now after Verdict take Advantage thereof. As 20 *Aſſ.* 3. is. But the other Juſtices, *econtra*. Becauſe here is not any Certainty at all, *pro Implementis & Neceſſariis*: But where there is a reaſonable Certainty, altho' upon Demurrer; becauſe 'tis not altogether certain, Judgment ſhall be againſt the Incertainty; yet after Verdict he ſhall take Advantage if there be any convenient Certainty; but here is not any Certainty. Wherefore it was adjudged for the Defendant. 1 *Cro.* 817. *Wood v. Smith.*

The Plaintiff declared in Trover for ſeveral Things, *& aliis Utenſiliis*, *Anglice* Implements, and obtained a Verdict; but the Damages being intire, Judgment was ſtaid, becauſe of the Incertainty of the Expreſſion, *aliis Utenſiliis quot quanta & qualia.* 3 *Lev.* 18. *Blackhouſe v. Moore.*

Judgment

Judgment was given in an Action of Trover and Converſion for the Plaintiff: The Defendant brought a Writ of Error; and the Exception taken was to the Declaration, wherein the Plaintiff among other Things declared of a Trover *de ducentis ponderibus æris & ducentis ponderibus plumbi, Anglice*, Braſs and Lead; and there wants *Anglice* for the *ponderibus*; ſo it is uncertain what the Quantity of either are. And upon this Exception the Rule was, That the Judgment ſhould be reverſed, *Niſi, &c. Style* 247. *Powell* againſt *Hopkins*. 2 *Roll. Rep.* 369. *Lawrence v. Turner. S. C. Palm.* 393.

Ponderibus, without an *Anglice*, is uncertain and naught after Verdict.

After Verdict for the Plaintiff in Trover, *inter alia de una Salſura, Angliee* a Salting-tub. 'Twas moved in Arreſt of Judgment, That *Salſura* was uncertain, and that it ſignified a Seaſoning. And *per Cur.* This is curable. 1 *Lev.* 99. *Mayhew v. Flower. S. C.* 2 *Sid.* 98.

Salſura is ill.

Trover was brought, *inter alia, de uno ferramento, Anglice* an Iron Range; after Verdict for the Plaintiff, and entire Damages, 'twas moved in Arreſt of Judgment, That *Ferramentum* was too general, becauſe it ſignified any Iron Tool; and here is a proper *Latin* Word to expreſs the Thing; for if it be ſuppoſed to mean the Grate, *Crates* is the *Latin* Word, if the Broach or Rack on which the Spit is turn'd, *Crateuta* or *Cratulorium* is *Latin* for it. The Judgment was ſtaid. 2 *Lev.* 177. *Dunwell & ux' v. Bullock.*

Ferramentum not good.

An Action of Trover and Converſion was brought for divers Goods and Houſholdſtuff; and amongſt the reſt the Plaintiff declared of a Trover and Converſion of ſix Tuns. After Verdict for the Plaintiff, 'twas moved in Ar-

A Declaration for ſix Tuns, is incertain and ill.

reſt of Judgment, That the Declaration was uncertain; for it cannot be known what is meant by ſix Tuns; and upon this the Judgment was ſtaid till the Plaintiff ſhould move. Whereupon Serjeant *Twiſden*, at another Day, moved for Judgment, and ſaid, The Declaration was good enough; for it is known that the ſix Tuns are Brewers Veſſels, or elſe they ſignify nothing; and then no Damages are given for them, according to *Osborne*'s Caſe, and the Caſe where the Action was *pro viginti ulnis* inſtead of *ulmis*. *Wyndham*, on the other Side, ſaid, That a Tun is a Meaſure, and well known to be; and you ought to ſhew the Certainty of what you do demand, the Quantity of ſix Tuns; and it cannot be ſaid, that the ſix Tuns ſhall ſignify nothing; for here the two Words are Subſtantives, and ſignify by themſelves, and not Adjective; and *Osborn*'s Caſe cited, was judged upon another Reaſon; for *Fulcrum lecti*, ſignifies a Bedſtead, and the *Anglice*, which was added, *viz.* Curtains and Vallens were a meer Addition, and no Part of the Declaration; and beſides they were in *Engliſh*, which ought not to have been. *Glyn*, Chief Juſtice, The Court hath delivered their Opinion already, That it is incertain what the Plaintiff doth mean by the Words Six Tuns; for this is not like the Caſes put, where a Thing is mentioned, which doth ſignify nothing; for there Damages cannot be given for ſuch a Thing; for the Word Tun doth ſignify divers Things; but it is incertain what it doth ſignify here; and therefore *Nil capiat per billam*. *Ask*, Juſtice, *Ad idem*. *Style* 483. *Clark* and *Fitzwilliam*.

Where Words ſignify nothing, there no Damages ſhall be intended to be given for them, and ſo the Declaration will not be hurt by them, but where they ſignify many Things, till ill for the Uncertainty.

Dyer

Dyer brings an Action of Trover and Converſion, in the Court of *Briſtol*, againſt *Segar*, and hath a Verdict and Judgment againſt him; *Segar* brings his Writ of Error in this Court to reverſe the Judgment; and aſſigns theſe Errors. 1ſt, To the Declaration, which was of the Trover and Converſion *de uno Pullo, Anglice*, a Colt; whereas *Pullus* ſignifies not a Colt, but properly a young Hen, and hence we had the Word, Pullet; but in a general Acception of the Word, it may ſignifie alſo other young Things, but then it muſt have an Adjective of the *Species* which it is to ſignify, or a Subſtantive of the Genitive Caſe joined with it; as *Pullus equinus*, *Pullus aſinius*, or *aſini*, and the like, and ought not to be uſed alone to ſignify a Colt, with an *Anglice* joined to it, as it is here. The ſecond Exception was, That is not well ſet forth how the Court was held where the Judgment was given; for he doth not ſhew that the Court was held either by Letters Patents, or by Preſcription, but ſaith, *Ad Curiam tentam tali die coram A. D. J. H. &c. a tempore cujus contrarium memoria hominum non exiſtit, &c.* which cannot be a good Preſcription; for a Court cannot be held at ſuch a Day, and before ſuch particular Perſons, if it be not expreſſed to be *Secundum Conſuetudinem*. The Rule of Court was to ſhew Cauſe, *Tueſday* following, why the Judgment ſhould not be reverſed. *Style* 31. *Segar* and *Dyer*. *S. P.* 2 *Sid.* 60. *Ellis v. Tarrow*. *S. P.* 1 *Lev.* 48.

Declaration in Trover *de uno Pullo*, uncertain, for not ſaying of what *Species* the *Pullus* was, tho' it had an *Anglice*.

Heath, a Carrier, brought an Action of the Caſe againſt *Udall*, and declares amongſt other Things for plundering him of *Viginti Fardellas*, *Anglice* Packs. And in Arreſt of Judgment it was moved, That the Words *Viginti Fardellas Anglice*

Fardella, *Anglice*, Packs, ill.

Anglice Packs, is uncertain. But *Maynard* argued, That it might be good, becauſe the Carrier could not declare otherwiſe; for he could not know what was in the Packs: And he cited one *Bedingfeild*'s Caſe, *Trin.* 10 *Car.* where an Action was brought for a Library of Books, and for Apparel, and adjudged good. But *Rolle*, Chief Juſtice, ſaid, It could not be good for the Apparel. *Wadham Wyndham*, on the other Side, held the Words uncertain as they are, and ſaid, He ought to have ſhewed that they were Packs with Goods, or have ſhewn what was in them; for a Pack is but a Meaſure of a Thing, then no Damages are given for them; and then the Action is good for the Reſt. Afterwards *Maynard* moved for the Opinion of the Court; and thereupon the Court held, That the Words are incertain as they are; for he ought to have expreſſed what was in the Packs; ahd ruled *nil capiat per billam* to be entred. *Style* 358. *Heath* and *Udall*.

So of Apparel.

20 *Menſuris, viginti duodenis*, are ill.

Trover was brought *de viginti menſuris*, without any *Anglice*, or ſaying what Meaſures, and *de viginti. duodenis*, *Anglice* Groſs, *Hamarum*, *Anglice* Hooks, without ſaying what Hooks; 'twas alſo alledged, That *duodenis* is an Adverb, and ſignifies twelve, and ſo inſenſible; but *duodenis duodecim*, was *Latin* for a Groſs, to wit, twelve Times twelve, as appears by the Dictionary; and for theſe Cauſes Judgment was ſtaid. 2 *Lev.* 11. *Coleman, & al' v. Bard* and *Nelmes*.

Parvis teneolis, tho' with an *Anglice*, is ill.

In an Action of Trover, *inter alia*, *de duobus albis Nodis*, *Anglice* white Knots, and *aliis parvis teneolis*, *Anglice* ſmall Ribonds: After Verdict for the Plaintiff, 'twas moved in Arreſt of Judgment, That *Aliis parvis teneolis*, is un-

uncertain; and for this Cauſe Judgment was ſtaid. 2 *Lev.* 85. *Miller v. Green.*

A Writ of Error was brought to reverſe a Judgment given in the Common Pleas, in an Action of Trover and Converſion of divers Goods, for many improper Words uſed in the Declaration, to expreſs ſeveral of them; as 1. *Argenteum Servitium* is uſed to expreſs a Silver Salt-ſeller, which is not good, for *Servitium* is *Latin* for Service; and in *Parker* and *Martin*'s Caſe, in this Court, *Inſtrumentum ferreum, Anglice* a Horſe-lock, was held not good; and 3 *Jac. Robotum*'s Caſe, *Hama, Anglice* a Crow of Iron, was adjudged naught. 2dly, He declares *de duobus Caſtoribus, Anglice* two Hats. 3dly, *De duobus Catenis pro patinis, Anglice* Diſhes. 4thly, *De duodecem Crinalibus & Plagulis, Anglice* Coifs and Croſs-Cloaths. *Ed. Turner* prayed for Judgment, notwithſtanding theſe Exceptions: Becauſe, as to the 1ſt. There is no proper Word for a Silver Salt-ſeller; and it is well enough deſcribed by divers Words. 2dly, There is no proper Word for Hats, called Demy-Caſtors; and therefore it is lawful to frame Words; and ſo for the reſt, being new Things, not known to the *Romans*, there are no *Latin* Words for them, and ſo Words may be invented well enough to expreſs them; and *Servitium Argenteum* is here with an *Anglice*, and therefore it is a good Deſcription of the Thing; and *de Inſtrumento ligneo Compoſito, Anglice* a Skreen, hath been adjudged good, becauſe there is not a proper Word to expreſs it. But the Court doubted of the Words uſed for Coifs and Cloſe-Cloths, becauſe they are divers Things. *Jerman*, Juſtice, ſaid, *Argenteum Servitium, Anglice* a Silver

Inſtrumentum ferreum, Anglice a Horſe-lock, is naught; ſo is *Hama, Anglice* a Crow of Iron.

Inſtrumentum Lignеum Compoſitum, Anglice a Skreen, is good, and why.

Silver Salt-ſeller, cannot be good; for *Servitium* is *Latin* for Service. But *Rolle*, Chief Juſtice, ſaid, If *Servitium* ſignify nothing, then the Jury gave no Damages for that; and then the reſt may be good. But yet the Judgment was ordered to be reverſed, except Cauſe ſhewed, and was then, at the Prayer of the Counſel, pronounced; which if it be not prayed, the Judge will not do it. *Quod nota. Style* 194.

The Judge will give no Judgment unleſs 'tis prayed.

Pot-hooks and Hangers, is ill.

Trover for two Pair of Pot-hooks, *&c.* and Hangers, *&c.* After Not Guilty pleaded, and a Verdict for the Plaintiff, *Allen* moved in Arreſt of Judgment, That Hangers is a too incertain and equivocal Word. *Baldwin*, for the Plaintiff, inſiſted upon it, That ſince Pot-hooks preceded the Word Hangers, the Court could not intend theſe were any other Hangers, than ſuch on which Pot-hooks uſed to hang. And he cited a Caſe of Trover for a Billiard-Table, Port, Sticks and Balls, and adjudged good, becauſe the Port, Sticks and Balls, ſhould be intended Things appurtenant to the Table. But the Court was of Opinion, That it was too incertain a Word; for the Word does not immediately follow the Word Pot-hooks, but there are divers other Things mentioned between; therefore Judgment was ſtaid. *Raym.* 2. *Seaman ver. Barnes*

But if thoſe Words had immediately followed one another, ſo as to ſeem to have relation one to the other, it might have been otherwiſe.

After a Verdict, the Defendant moved in Arreſt of Judgment; and ſhewed for Cauſe, That the Declaration was not good; for the Plaintiff amongſt other Things declares that the Defendant had found and converted to his own Uſe *Unum veſtigium, Anglice* a Foot-ſtool, whereas it ſignifies a Foot-ſtep, or a Print

Unum veſtigium, Anglice a Foot-ſtool, is ill.

Print of the Foot, and not a Foot-ſtool. 2dly, The Plaintiff declares *pro decem ponderibus Aeris*, meaning ten Pounds of Braſs, where it ſhould be *Æris*, with a Dipthong; for *Aeris* is of Air, and not of Braſs. But this Exception was over-ruled by the Court; becauſe in the Writing of Court-hand, in which Declarations are written, there are no Dipthongs uſed; and ſo the Word *Aeris* might as well ſignify Braſs as Air. But for the other Exception, Judgment was ſtaid till the Plaintiff ſhould move. *Style's Rep. Robinſon's* Caſe. 69.

Decem ponderibus Aeris, is good.

Exception to an Action of the Caſe brought, and the Plaintiff declares, That whereas the Plaintiff had delivered the Defendant *unum Statum ſalis, Anglice*, a Buſhel of Salt, pretending that *(Statum)* had an other proper Signification; but becauſe it was ſhewed to the Court, that *(Statum)* by one Dictionary, was *Latin* for a Buſhel, Judgment was given for the Plaintiff. 1 *Brownl.* 16.

Statum ſalis, is good.

In Error upon a Judgment in the Common-Bench, in an Action of Trover, where Judgment was given for the Plaintiff. The Error was aſſigned in the Declaration, which was *de decem Juvencis, Anglice* Bullocks and Heifers, and did not ſay how many of the one and of the other.

Decem Juvenci, Anglice Bullocks and Heifers, ill, for not ſaying how many of each.

But it was anſwered, That the *Latin* Word being proper, and of known Signification, the *Anglice* was void, according to *Osbourn's* Caſe. 10 *Co.* But the Court reverſed the Judgment, and cited the Caſe before in this Court, Trover *de viginti ovibus matricibus & agnis*; and it was reſolved to be naught, for not aſcertaining the Number of each. But *Twiſden* ſaid, There was a Trover brought *de viginti averiis*, (viz.) *Bobus agnis, &c.* and *viginti* was applied

to

to each *Species*, and held well. It was offered in this Case, to distinguish it from the Case *de ovibus matricibus & agnis*, that there the *Latin* was of two Sorts; *sed non allocatur*; for the Words here being equivocal, it was all one. 1 *Ven.* 317. *Davis v. Price.*

A Declaration for a Number of Cattle all of one *Genus*, good, without mentioning how many of any *Species*.

Sawyer brought an Action upon the Case against *Russell*, for taking away certain Cattle, and obtained a Verdict against the Defendant; the Defendant moved in Arrest of Judgment, and took Exception to the Plaintiff's Declaration for the Incertainty thereof. The Plaintiff declared for a Trover and Conversion, *de ducentis Averiis*, viz. *Bobus*, *Juvencis*, *Anglice* Steers, *Juvencis*, *Anglice* Runts, and *Juvencis*, *Anglice*, Heifers, which is uncertain, and so Judgment cannot be given; for it is uncertain for what Number of each of the Steers, Runts, and Heifers Judgment shall be given. *Rolle*, Chief Justice, inclined that it is certain enough; and that the Number may be averred, and the Cattle are all of one Kind; yet the Court would advise; afterwards it was ruled, *Judicium*, *Nisi*. *Style* 264. *Sawyer* against *Russell*.

How to declare in Trover for a Hawk.

An Action of Trover and Conversion, was brought for a Hawk, called a *Ramish Falcon*, supposing that he was possessed of that Hawk, *ut de bonis propriis, & casualiter amisit*; and that she came to the Defendant's Hand, and he knowing her to be the Plaintiff's Hawk, yet being required, had not delivered her, but converted her to his own Use. Upon Not Guilty pleaded, and Verdict found for the Plaintiff, *Whitlock* moved in Arrest of Judgment, That the Declaration was not good to maintain this Action; because he doth not shew that she was a reclaim'd Hawk, and made tame, nor that she had Bells

or

or Varvels, to shew who was her Owner: And a Ramish Hawk is properly such a one as liveth *inter Ramos*, and from thence hath its Name: And therefore relied upon the Book 14 *Eliz.* *Dyer* 306. Sir *Richard Fines*'s Case. And *Jones* and *Berkeley* inclined to this Opinion. But *Croke* conceived the Declaration to be good enough, because it is aided by the Allegation; that he was possessed of the said Hawk, *ut de bonis propriis*, and that the Defendant knowing her to be his Hawk, converted her, &c. And it differs from the Case of Sir *Richard Fines*; for there, altho' the said Exception was taken to the Count, yet it doth not appear, but that the Count was there held to be good enough. But because the Defendant's Plea was held good, it was adjudged against the Plaintiff; not for the Insufficiency of the Count, but upon the Demurrer upon the Plea in Bar, which was held sufficient. *Vid. Co. Lib.* 7. *fol.* 17. the Case of *Swans*, of what Beasts and Birds a Man may have Property. This Case was after moved again; and then because upon divers former Motions, the Court was always divided in Opinion; the Plaintiff for his greater Expedition, consented that Judgment should be entred against him: So the Judgment was entred, *Quod nihil capiat per billam.* And then the Plaintiff began a new Action in the Common Bench, and amended that Fault in his Declaration, and had Judgment by Confession of the Action, and only three Pound Damages given by a *London* Jury. And thereupon *Henden* moved in this Court to have Costs in his former Action; but because the Verdict was found for the Plaintiff, and upon Exception to the Declaration,

Of what Beasts one may have Property.

When no Costs shall be given.

ration, Judgment was given againſt him, the Court held, That no Coſts ſhould be given. 3 *Cro.* 545. Sir *Martin Lyſter v. Home. S. P. Dyer* 306. *Fines v. Spencer.*

Duobus Caſtoribus, Anglice Hats.

In an Action of Trover and Converſion in the Common Pleas, for taking away and converting of divers Goods and Chattels particularly named; after a Verdict, the Defendant moved in Arreſt of Judgment, That the Declaration was incertain; for among other Things, the Plaintiff in his Declaration declares for the taking *de duobus Caſtoribus, Anglice* Hats; whereas *Caſtor* is not a proper Word for a Hat. 2dly, *de uno Servitio argenteo, Anglice* one Silver Salt, and there is no ſuch Word for it, but there is another proper *Latin* Word for it, *viz. Salinarium.* 3dly, *de duobus catenis, Anglice* two Silver Diſhes, which is no Word for a Diſh, much leſs for a Silver Diſh. *Rolle*, Chief Juſtice, ſaid, One may deſcribe a thing in a Declaration, if there be not a proper Word to expreſs it; and if it be ſo deſcribed that the Jury may know what is meant by it, it is well enough: But let the Judgment be here ſtaid, for we will adviſe. *Style* 136. *Heyford* againſt *Hobſon.*

Unoſervitio argenteo, one Silver Salt.

Duobus Catenis, Anglie two Silver Diſhes. Where there are no proper *Latin* Words, if the Thing is ſo deſcribed that it may be known, it's good. Whether a Declaration *de Bonis & Catallis*, being only for a Bond, is good on a Demurrer.

In Trover the Plaintiff declares, That he was poſſeſſed *de bonis & catallis ſequen' ut de bonis & catallis propriis videlicet de uno Scripto Obligatorio & uno Warranto, &c.*

The Defendant pleaded in Abatement, That the Bond and Warrant were not Chattels; and upon a Demurrer to this Plea, it was ſaid, That neither the Bond, nor the Value thereof, can be demanded by ſuch Names as *Bona & Catalla*; becauſe (as the Opinion is in *Yelverton*) a Bond will not paſs by ſuch general Names.

In

In Detinue the Thing it ſelf muſt be ſpecially named; becauſe it is to be recovered *in Specie*: The ſame Reaſon may govern this Caſe.

But it was anſwered, That by the Gift of all his Goods and Chattels a Bond would paſs; and this was the Opinion of *Fitzherbert* in *Dyer*; and to his Opinion the Court now inclined. 4 *Mod.* 156. *Cook v. Bolinger.*

In Trover of divers Goods, *&c.* the Defendant pleaded Not Guilty; and after Verdict and Judgment for the Plaintiff, Error thereof was brought; and the firſt Error aſſigned was, Becauſe he declare, *inter alia, de uno Quarter. Grani, Anglice* Miln's Corn, where it ought to have been *Quarterium*; for *Quarter* is not any Word Secondly, He alledgeth that he was poſſeſſed *de una Parcella piſcium, Anglice* Lings, and it was not alledged what Parcel: And for theſe Cauſes it was held to be ill, and Damages being intirely given, reverſible in all. Thirdly, Becauſe the Iſſue being Not Guilty, the Jury did not find that he was Guilty: But *quod detinet*, and converted them to his Uſe, which is tantamount; but becauſe it is not found according to the Iſſue, it was held to be ill. But it was conceived by ſome of the Juſtices, That it was amendable, if it might appear by the Examination of the Clerk of the Aſſize, that the Verdict was found generally for the Plaintiff; but they would adviſe. 1 *Cro.* 865. *Gramvel v. Rhobotham.*

Una Parcella piſcium, tho' with an *Anglice*, ill; ſo of *Quarter* for *Quarterium*.

Where the Damages are intire, if any Part is ill, the Judgment muſt be ſtaid for the Whole.

A Precedent of a Declaration in Trover.

Willielmus Harris nup de Nockholt in Com̃ pdict Yeoman attach fuit ad respondend̃ Johanni Allen Junioꝛi de placito transgr̃ sup̃ casum, &c. Et unde idem Johannes p̃ Henr. Straetfeild Attoꝛnat̃ suum queritur quare cum p̃d Johannes pꝛimo die Decembris anno Reg̃ Dom̃ Regis nunc septimo apud Chiddingstone in Com̃ pdict possessionat̃ fuisset de 2 Incerulis sericis, Anglice two Silk Wastcoats ad valenc̃ quinq; libꝛar̃ & duobus equis pcii quinq; libꝛar̃ ut de bonis & catallis suis ppr̃, Et sic̃ inde possessionat̃ existen̄ bona & catalla pdict extra manus & possessionem suas casualit̃ pdict & amisit que quidem bona & catalla postea scilt̃ die & anno supꝛad̃ apud Chiddingstone p̃d ad manus & possessionem ipsius Willielmi p̃ inventionem devenerunt p̃d tamen Willielmus sciens bona & catalla p̃d Johannis & ad ipsum Johannem de jure spectare & pertinere sed machinans & fraudulent̃ intendens eundem Johannem de bonis & catallis p̃d callide & subdole decipere & defraudare bona & catalla p̃d licet sepius requisit eidem Johanni non deliberavit sed bona & catalla p̃d postea scilt̃ pꝛimo die Januarii anno Regni dict̃ Domini Regis nunc septimo supꝛadicto apud Chiddingstone p̃d in usum suum ppr̃ convertit & disposuit ad dampnum ipsius Johannis decem Libꝛarum & inde pꝛoducit̃ sectam, &c. Lut. 1537. Allen versus Harris.

Re-

References to all the Precedents of Declarations in Trover that are extant in the Books of Entries.

De Bonis & Catallis. Wilk. 285.
Simile per Attorn' per privileg'. 3 Br. 428.
De Bove. Co. Entr. 38, 40.
De 100 caretat' ligni & 40 fagis. Co. Entr. 41.
De Bladis in garbis ſeperat. pro decimis. Moo. 488.
De annulo aureo cum lapide pretioſo in eodem. Ub. 283.
De accipitre reclamato cum tintinabulis. Dyer 306. Ub. 239. Her. 104, 243.
De obl' Statuti Mercatorii. Ub. 233.
Quer' fuit poſſeſſ. de bonis quæ amiſit, & quæ deven' ad manus def. per Trover qui ea vendidit. Ra. Entr. 5. Dyer 121. Her. 149. 251.
Pro exec' de averiis amiſſis & converſis in vita teſtatoris. Her. 122.
Pro exec' de bonis de quibus teſtator obiit poſſeſſ. & quæ poſt ejus mortem devener' ad manus def. Her. 243.
Pro admin' de bonis amiſſis & converſis in vita inteſtat'. 1 Br. 157.
De bonis & averiis amiſſis per inteſtat' & quæ poſt ejus mortem devener' ad manus def. Co. Entr. 38.
De bonis amiſſis per inteſtat. & invent. poſt adminiſtrat' commiſſam. Her. 87.
Simile de averiis & catallis. Her. 122.
De bonis. Vid. 265. Cl. Aſſ. 220.
Simile in Cur' inferiori. 1 Bro. 358.
De bonis & catallis. Win. Entr. 31. Mo. Intr. 13. 2 Ven. 63. Re. dec. 424.
Simile verſus 2 ubi un' eorum waviat' exiſtit. Bro. Vade mec. 44.

Simile per Attorn' for divers Goods, Houſhold-ſtuff, and other Particulars. *Bro. Va. ma.* 52.

De equo. Vid. 8.

De Spadone. Vid. 266. Cl. Aſſ. 232.

De bove. Win. Entr. 61 *Simile* Tre. Tro. 137.

De 2 bobus. Win. Entr. 32.

De vacca in Cur' Inferior'. Tre. Tro. 155.

De poculo argenteo. Tho. 32. *Simile* Tre. Tro. 142.

De ſalino argenteo per Attorn' per Privileg'. Ra. Entr. 24.

De amphora argentea. Cl. Aſſ. 233. *Simile de quibuſdam peciis & annulis auri.* Re. Dec. 421. *Simile pro adamante.* Id. 422.

De accipitre reclamato cum tintinnabulis. Tho. 33.

De Panno laneo. Ra. Entr. 69. Cl. Aſſ. 232.

De Braſilico ligno capt' in partibus Hiſpaniæ. Ra. Entr. 451.

De navi & gomis. Br. R. 69.

De Bipenne. Vid. 264.

De ſcripto obligatorio ver. Attorn'. 1 Bro. 356. *Simile* Tre. Tro. 142.

Simile pro Infante per Guardian'. Bro. met. 19.

De billa obligator' quam def. fec' quer'. 1 Bro. 355.

De Baga corii & pecuniis numeratis in eadem. 1 Bro. 356. *Simile* Tre. Tro. 141.

De quinquagint' ponderis lani. 1 Bro. 358.

De pecuniis numeratis Re. dec 423.

De pecuniis numeratis quas def. deceptioſe acquiſivit extra manus uxoris quer' ad chartas pictas. Vid. 265.

Per adminiſt' pur deniers perde per le inteſtat'. 2 Saun. 137.

Pro exec' de averiis amiſſis & converſis in vita teſtatoris. Vid. 264 Tho. 31. Ra. Entr. 452.

Simile

Simile per exec' del. exec' de bonis. Ra. Entr. 550.

Pro exec' de bonis amissis, in vita testatoris, & quæ post ejus mortem deven' ad manus def. Ra. Entr. 447. Mo. Intr. 16. *Simile pro vito & uxore Exec'.* Mo. Intr. 16.

For Money lost by the Wife at a Game of Cards, call'd *Noddy*. *Tre. Tro.* 143.

Simile by Baron and Feme Executors. *Lev.* Entr. 32.

Where the Goods came to the Defendant's Hands in Testator's Life-time. *Tre. Tro.* 147, 150.

Pro exec' de bonis de quibus testator obiit possess. & quæ post mortem ejus devener' ad manus def. Ra. Entr. 80. Mo. Intr. 15. *Simile* Tre. Tro. 145. 152. *Simile* By *administrat' in* Br. R. Id. 152.

Pro adminiss' de bonis amissis per intest' at' & invent' post administration' commissam. Tho. 32.

Simile de scripto obligatorio amisso per intest. in vita sua & post ejus mortem deven' ad manus def. Vid. 265.

Simile de un' Corslet, Pike, Sword, Belt, *&c.* Ibid.

De monet' Flandriæ amissa ver. 2 quorum unus post conversion' & exhibition' billæ obiit. Ra. Entr. 445.

Pro admin' de bonis & averiis intestat' amissis post administrat. commissam & qui devener' ad manus def. per Trover qui convertit. Mo. Intr. 17, 18. *Simile* Tre. Tro. 148.

Quer' ut serviens communis fuit possess. de bynis quæ amisit & quæ deven' ad manus def. per Trover qui ea vendidit, & averment quod ratione inde perdidit servitium. Mo. Intr. 14.

Pro Rege Hispan' de ligno Brasilico amiss. Ra. Entr. 451.

Pro Aſſignee de Commiſſion' decoctor' de bonis & catallis. 2 Ven. 63. 156. *Demurrer inde* 66. *Simile* 2 Mo. Intr. 81.

Trover by a ſurviving Merchant. *Lev. Entr.* 19.

CHAP. V.

Of the Pleadings in Actions of Trover.

THere's no one Point of Law in which there is ſuch Variety of Opinions and Reſolutions as there is concerning the Pleadings in Trover and Converſion: Some of our later Authorities condemning all Pleas almoſt, except the General Iſſue, as amounting to no more, tho' it appears by a Multitude of Caſes, that many other Pleas have been allowed. We, according to our Method, ſhall offer to the Reader's View all that occurs either in the Report-Books, or Books of Entries, leaving him to judge for himſelf, what Caſes are Law, what not; for it would ſeem arrogant for a private Judgment to condemn ſo many Authorities as may be produced on either Side.

Plea, the Plaintiff had nothing *niſi conjunctim & pro indiviſo.*

In an Action of Trover and Converſion; the Plaintiff declares for taking 600 Load of Oar. The Defendant pleads, That the Plaintiff never had any Thing in the ſaid 600 Load of Oar, *niſi conjunctim & pro indiviſo*, with two others; and ſo concludes in Abatement.

The

The Plaintiff replies, That *J. S.* was seised in Fee of a Close, in which this Oar was digged; and being seised, he died; after whose Death the said Close descended to *A.* and *B.* his two Daughters and Co-heirs; and that the Plaintiff married one of them, and the other was also married; and so the Plaintiff and the other Husband, and their Wives, were seised in Right of their said Wives, of this Close. That afterwards, and before the Action brought, 2000 Load of Lead-Oar was digged out of the said Close, and laid there in Heaps; and then a Partition was made by Deed, of the said Close and the Oar, and 1000 Load was allotted to one Sister, and her Husband, and the other 1000 Load was allotted to the Plaintiff, *per quod* he became *solus Possessionat.* of the said 1000 Load in Severalty; and being so possessed, the Defendant found 600 Load, Parcel of the said 1000 Load, and converted it; *absque hoc* that the Plaintiff had any Thing after the Partition *Conjunctim* with any other Person. The Defendant rejoins, that at the Time of the Conversion the Plaintiff had nothing but *Conjunctim* with the other, as before.

And the Plaintiff demurred; 1. for that the Defendant ought to have traversed the Partition; for tho' the Possession was Joint, the Partition had made it Several, by which the joint Possession was confessed and avoided; and therefore the Traverse good, like the Rule laid down in my Lord *Hobart*, 104. in *Digby* and *Fitzherbert's* Case, Trespass, *tali die*, the Defendant confesseth it, but pleads a Release of all Actions, and traverseth all Trespasses after.

2. The

2. The Rejoinder is a Departure from the Plea, which is, That the Plaintiff never had any thing but jointly with others; and the Rejoinder is, That at the Time of the Converſion, he was jointly poſſeſſed, which is a manifeſt Difference in Point of Time, and ſuch as will make a Departure. 33 *H.* 14. *Bro. Departure*, 28. 13.

It was argued by Serjeant *Hopkins*, for the Defendant, That the Replication was not good; for the Plaintiff therein alledged a Partition by Deed, and doth not ſay, *hic in Curia profert.* and in all Caſes where a Man pleads a Deed, by which he makes himſelf either Party or Privy, he muſt produce it in Court; as where the Defendant juſtifies in Treſpaſs, that before the Plaintiff had any thing, one *Purfrey* was ſeiſed in Fee of the Place, *&c.* and by Indenture, *&c.* demiſed it to *Corbet*, excepting the Wood, *&c. habendum*, for the Life of *Anne*, and covenanted *quod licitum foret* for the ſaid *Corbet* to take Houſe-boot, *&c.* That he aſſigned his Intereſt to *Anne*, and that the Defendant, as her Servant, took the Trees; and upon Demurrer, the Plea was held naught, becauſe (tho' a Servant) having juſtified by force of a Covenant, he did not ſhew the Indenture. 2 *Cro.* 291. *Purfrey* ver. *Grimes.* 6 *Rep. Bellamy's* Caſe.

If a Thing will paſs without a Deed, yet if the Party pleads a Deed, and makes a Title thereby, he muſt come with a *profert hic in Curia.*

As

As to the Objection, That there was a Departure, he argued to the contrary: For the Defendant in his Rejoinder insists only on that which was most material; and the Plaintiff in his Replication, had given him Occasion thus to rejoin; and tho' he had left out some of the Time mentioned in the Bar, yet that would not hurt the Pleadings, because a fair Issue was tendred; for if at the Time of the Conveyance he was jointly seised, he could not be intitled to the Action alone.

And afterwards, *in Trinity* Term following, the Chief Justice delivered the Opinion of the Court, That the Plea was good in Bar, tho' pleaded in Abatement; and the Defendant hath Election to plead either in Bar or in Abatement. The Nature of a Plea in Abatement, is to intitle the Plaintiff to a better Writ; but here the Defendant shews that the Plaintiff hath no Cause of Action, and so it shall be taken to be in Bar: And it hath been expressly resolved, That where the Plea is in Abatement, if it be of Necessity, that the Defendant must disclose Matter of Bar, he shall have his Election to take it either by way of Bar or Abatement. 2 *Roll. Rep.* 64. *Salbil v. Shilton.*

So where Waste was brought in the *Tenet*, the Tenant pleads a Surrender to the Lessor, and demands Judgment, If he should be discharged in the *Tenet*, because it should have been in the *Tenuit*; and this was held a good Plea. 10 *H.* 7. 11. whereupon Judgment was given for the Defendant; the Chief Justice at first doubting about the Departure, and advised the Plaintiff to waive his Demurrer, and take

take Iſſue, upon Payment of Coſts. 2 *Mod.* 63. *Stubbins ver. Bord & al.*

Plea in Abatement, another Action depending, v. the Defendant and *T. S.*

In Trover, after Imparlance, the Defendant pleaded, That the Plaintiff (with two others) brought Trover for the ſame Goods before; which Action is ſtill depending; and demanded Judgment of the Writ.

The Plaintiff replied, That the other two died before the Action was brought, and ſo that Writ abated; to which it was demurred, and Judgment *quod reſpondeat ouſter*; for in all Actions, where one Plaintiff dies the Writ abates (ſave in an Action brought by two Executors). And *Hale* ſaid, ſo it ſhould in a *Quare Impedit*; but that it is revivable by *Journeys Accounts*.

Wylde ſaid, That the Pleading, that the two died before the Action brought was double. *Hale*, No; for he muſt ſhew both were dead, to enable him to bring this Action alone. *Twiſden*, How comes this Plea in Abatement after an Imparlance?

Hale, Tho' after an Imparlance the Defendant cannot plead a Miſnoſmer, or the like, or Antient Demeſne; becauſe he admits, he ought to anſwer the Writ; yet ſuch a Plea in Abatement as this, he may; but that comes not in Queſtion; becauſe the Plaintiff replied to it, and did not demur.

Plea to the Juriſdiction, how to be pleaded, and when good.

In an Action of Trover and Converſion for three Cart-loads of Oats, Barley and Peaſe, the Defendant pleaded a Special Plea to this Effect; That the Land where the Trover was ſuppoſed to be is five Acres of Land lying in *B.* in the County-Palatine of *Cheſter*, and that he holds the Land for Term of Years;

and

and by Vertue thereof did ſow and take the Corn thereupon growing, and traverſeth the Converſion out of the County-Palatine; and avers, That there are Courts of Juſtice held within the County-Palatine, ſo that Juſtice may there be had; and ſays, that he ought to be ſued within the County-Palatine, and not elſewhere; and therefore demands Judgment if he ought to be ſued in this Court. To this Plea the Plaintiff demurred, and ſhewed for Cauſe, That the Action being of a Tranſitory Matter, it may be tried out of the County-Palatine, as well as within, altho' if it were for a local Matter, it would be otherwiſe; and the Party here hath pleaded Not Guilty, which may be tried any where. *Coke's Inſtit.* 282. In ſome Caſes an Obligation bearing Date at *Cheſter*, may be ſued in another Place. 19 *E.* 3 *Fitz. Gar.* 29. 45 *Ed.* 3 *Fitz. Viſne*, 50. 9 *Car. C. B. Richardſon* and *Mear's*, a Battery in *Cheſter* triable out of it. 11 *H.* 4. *f.* 40. *Crompton Juriſdiction of Courts*, *f.* 213. Tranſitory Things emergent in the County-Palatine of *Cheſter*, may be tried elſewhere. 45 *E.* 3. *f.* 17. And it was prayed the Defendant might plead over. Serjeant *Glyn*, on the other Side, held, That this Plea is a good Plea to the Juriſdiction of the Court. Here are many Matters of Fact confeſſed; and the Matter in Law is, Whether the Title of the Land within *Cheſter* ſhall be tried out of that Juriſdiction? In 31 *Ed.* 1. in the Exchequer it is clear they have Conuſance of Pleas. *Rolle*, Chief Juſtice, to that anſwered, But it is not that they ſhall not be removed thence. Serjeant *Glyn* proceeded, and ſaid, That alſo upon

on Reference to four Judges, by Queen *Elizabeth*, it was certified, That all Actions, Real and Perſonal, ariſing in *Cheſter*, are triable there, and not elſewhere. 22 *E.* 4 *Fitz. Juriſd.* 61. 21 *H.* 7. *f.* 23. 1 *H.* 7. 26. 10 *H.* 6. 14. 2 *H.* 4. *f.* 25. As to the Objection, that this is a clear perſonal Action, and therefore Tranſitory. 1ſt, I deny the Authority of *Coke* in his *fourth Inſtitutes*, cited on the other Side. Next the Action here by the Pleading of it is made Real; and then tho' *Coke*'s Opinion ſhould be Law, it comes not home in our Caſe; and a tranſitory Action may be made Real by the Pleadings of it. 27 *H.* 6. *f.* 1. *Hill.* 28 *Eliz. Banc. ſup. Hill.* 2 *Car.* in *Bellamy* and *Bolsborp*'s Caſe, in this Court. 6 *Rep.* 14. A Thing is triable there where the beſt Connuſance of it may be had. 6 *H.* 7. 2dly, The Averment of the Party here is, That all Actions Perſonal and Real within *Cheſter*, are triable there; and this being Matter of Fact, is confeſſed by the Demurrer. 9 *H.* 7. *Porter* and *Nicholls*, in the Exchequer, 10 *Car.* and it would be a great Inconvenience to try the Title of Lands lying within *Cheſter*, out of it; for ſo all Cauſes Real may as well be tried in Foreign Countries, even thro' all *England*, which may be very miſchievous. *Rolle*, Chief Juſtice, If we can avoid it, it is not good to try Cauſes in Foreign Countries; but here you have by your Demurrer confeſſed, that all Cauſes Real and Perſonal ſhall be tried there; and what ſay you to that? 2dly, It is to be conſidered, whether your Traverſe be not repugnant to your Plea; for you have waived the Plea to the Juriſdiction of the Court,

Court, and put your self upon an Issue by the Traverse, which you ought not to have done; but you ought to have relied upon your Plea, to the Jurisdiction of the Court; for, as the Traverse is taken, until a Trial be had in the Cause, we cannot tell whether the Trover and Conversion be within the County-Palatine, or out of it; and this is Matter of Substance, and triable, and therefore it would be hard to maintain your Plea. At another Day the Case was argued again; and first by *Twisden* for the Plaintiff, and he took three Things into Consideration; 1st, Whether the Plea were a meer Plea to the Jurisdiction? 2dly, Whether it be made good by the Demurrer? 3dly, Whether the Traverse have not spoiled the Plea? 1st, He held the Plea was not good, because the Action is meerly Transitory, and may be laid in any Place. 2 *Mar. Br. Traverse*, 288. *Co. Lit. f.* 202. and the Defendant cannot plead, That the Cause of Action lies in any other Place, than where the Plaintiff lays it; *Coke's Jurisdiction of Courts*, is full Authority in Point, whatever is objected against it. 30 *H.* 6. *f.* 6. I admit of the Jurisdiction of the Court-Palatine; but yet it must not entrench upon the Common Law; and I admit all the Books cited, but they are of other Local Matters, or of Things transitory, which is fixed in *Chester* by the Pleading of them. And *Dyer* 122. comes not to our Case, nor crosses the Case of 10 *Car.* 3 *Rep. Ridgway's* Case; and here it shall not be intended that the Jury may there have best Conusance of the Matter where the Action is laid, and not elsewhere, altho' the Action do savour of the Land. For

the

the ſecond Matter the Demurrer makes not the Plea good; for the Law ſays, it is not good, and the Parties cannot alter the Law. *Burton*'s Caſe. 5 *Rep. f.* 59. 5 *H.* 7. 1. 3dly, The Traverſe makes not the Plea good; for the Travreſe is waived, and he relies upon another Matter. 5 *Car. Rot.* 817. *Burton* and *Corniſh*, the Traverſe taken, took away the Juſtification before pleaded, ſo it doth here; and the Traverſe here is not good, becauſe it is a tranſitory Matter. Where one juſtifies a thing done it ought to be confeſſed, that he did it; ſo if he Traverſe that he hath not done a thing here, it implies it is done ſomewhere elſe. *Latch*, For the Defendant made this Queſtion, Whether upon the Matter, as it is here pleaded, the Juriſdiction of this Court be taken away? And he held it is. It is the Honour of this Court to maintain the Juriſdiction of all other Courts, and therefore I hope it is not misbeſeeming me to put it in Mind of this Honour that belongs to it; I believe that according to the Antient Law of the Land, Actions ought not to be laid elſewhere than where the Matter that cauſed them did ariſe, altho' that now by Cuſtom it is otherwiſe. Altho' the Plaintiff may fix a tranſitory Action where he pleaſeth in ordinary Matters, yet he cannot do it where the Matter ariſeth within a Special Juriſdiction, as the Caſe here is. It is not a good Allegation that binds up the Juriſdiction of this Court, except where it appears that the Allegation is true; and the Allegation here will ſtand with Law, it being in the Caſe of a County-Palatine, which hath ſuch a Juriſdiction incident

dent to it; and this Court *ex Officio*, ought to take Notice of the Juriſdiction of the County-Palatine, and that they have Authority to hold Pleas. 45 *Ed.* 3. *f.* 10. 50 *Ed.* 3. *pl.* 10. 10 *H.* 6. 16. The Averment is, That the Party remains within the Juriſdiction of *Cheſter*, that there may be intended to be a Failer of Juſtice, by the Party's going out of the Juriſdiction where the Offence was done. 44 & 45 *Eliz. Criſp & Verol.* Neither is the Plea by the Traverſe become ſo vitious as to retain the Juriſdiction of this Court thereby; for the County-Palatine cannot give up their Juriſdiction to this Court, as Antient-Demeſne-Courts, and other Courts may, by miſpleading of the Parties; for their Pleading is *coram non Judice.* 10 *H.* 6. 13. *C.* 9 *H.* 7. 12. 45 *E.* 3. *f.* 7. 22 *E.* 4. 23. 31 *H.* 6. 11. Nor doth the Traverſe here waive all the precedent Matter, but ſtand with it, altho' it be made narrower by it; but nothing is here waived. *Dyer* 165. Here is an Iſſue in Subſtance, which is good, altho' not in the Letter, and the ſtraightening of it ſhall not hurt; and the Court is neither inveigled, nor the Party wrong'd by it. *Dyer* 369. *Hob.* 119. This Traverſe binds not the other Party to join Iſſue upon it; but there may be a Traverſe upon a Traverſe, and he may plead another Plea. *Hob.* 18. *Newman's* Caſe. *Rolle*, Chief Juſtice, in your Preſcription, you have averred that he was an Inhabitant; but you have not averred, that they ought to hold Plea of tranſitory Matters, if the Party inhabit out of the Juriſdiction; and here the Party ought to be ſummoned; and if he dwell out of the

Juriſdiction, what Remedy can be had againſt him then? For how can he be ſummoned? And we cannot judge of the Juriſdiction; but by your Pleading, and by your Traverſe, you have tripped up your own Heels. The Reaſons why tranſitory Actions may be laid in any County is, becauſe that otherwiſe Juſtice might fail; for the Party may do a Fact in one County, and then remove to another; ſo here the Party may do Wrong within the County-Palatine, and then go out of it to avoid Juſtice. Another Day *Wylde* argued for the Plaintiff, and *Shaftoe* for the Defendant. *Wylde* held, That the Plea was ill, 1ſt, In the Inducement. 2dly, It is ill in the Subſtance of it. 3dly, The Traverſe is not good. The Inducement is ill, becaeſe it does not confeſs a Converſion; but here is a General Iſſue only pleaded. 9 *E.* 4. 5. 12 *E.* 4. 12. It is ill in the Subſtance, becauſe the Uſage pleaded is againſt Law, and will cauſe a Failer of Juſtice, which ought not to be; for the Law leaves no Perſon wronged without a Remedy. 19 *E.* 3. 29. *Fitz. Juriſdict.* 30 *E.* 3. *pl.* 10. 44 & 45 *Eliz. Criſp.* and *Verol's* Caſe, 2 *R.* 3. 4. *Harid* and *Peyton's* Caſe, 24 *Car.* 48. 2. *Inſt.* 4. *Co. Juriſdict.* 213. 13 *E.* 4. 25. Next the Traverſe hath waived all the Matter pleaded before; and becauſe the Plea was good before, there was no Neceſſity to take it. 20 *E.* 4. 3. And the Traverſe is alſo to ſtraight, for it hath tied up the Matter to *Wellington*, and ſo he prayed a *Reſpondeas ouſter*. *Shafto*, on the other Side, held the Plea good, and argued very much to ſhew the Juriſdiction of the County-Palatine; and cited *Coke's Juriſdiction*, *f.* 219.

f. 219. 22 E. 4. 24. *per Callow*, 156. *Hill.* 8 H. 7. *Rot.* 228. and he said the Plea is good, tho' it be not confined to the Inhabitants within *Chester*, for there was no necessity to plead thus; and it had been enough to have pleaded generally, because this Court takes Notice of the Jurisdiction of *Chester*. 11 *Rich.* 2. *Fitz. br.* And the Pleading hath always been in this Manner, as may appear by the Books of *Entries*. 1 E. 4. *f.* 11. And this Custom by Construction of Law, is necessarily to extend to the Inhabitants within the Jurisdiction. 21 *H.* 7. 40. *Dyer* 46. *Rast.* 128, 129. The Privilege of *Chester* follows the Persons of the Inhabitants; and so there can be no Failer of Justice, as is objected. And for the Traverse, tho' it be ill, it shall do no hurt in this Case to take away the Custom; for upon the intire Record, it doth appear that the Action lies within the Jurisdiction, and if Judgment be given here, it is *coram non Judice*; and so the Traverse is not material. 9 *H.* 7. 12. 37 *H.* 6. *f.* 26. *Coke's Mag. Charta. cap.* 247. *Mag. Char. f.* 241. *Westm.* 16. 35. *Bract.* 260. *Hill.* 7. *Car. Dymock's* Case in this Court. *Nicholas*, Justice, answered, The Justices of this Court are not bound to take Notice of the Custom of *Chester* otherwise than is alledged. *Rolle*, Chief Justice, The Matter is, whether we can take hold of your Case otherwise than you have pleaded, and your Plea is naught, and the Party may demurr upon it; for it appears not whether the Custom extends to *Wellington*, where the Trover was, because it appears not whether *Wellington* lies in the County-Palatine of *Chester*, or no; and the Plea cannot be good in Part, and ill in other

Part, as is ſuppoſed. *Jerman*, Juſtice, The Declaration here is good, and if the Plea be not good in anſwer to it, then it is ill. *Nicholas*, Juſtice, The Plea is contrary to Law and Reaſon, and Common Senſe; and there ought not to be a Failer of Juſtice. *Ask* of the ſame Mind. *Rolle*, Chief Juſtice, We muſt take all the Matter as is pleaded, and if the Plea be ill the other Party ſhall not be ſaid to confeſs any thing; and here you have pleaded a Plea in Bar, *viz.* Not Guilty; and you have alſo pleaded to the Juriſdiction of this Court, which cannot be; and we are not to examine the Juriſdiction but the Pleading; therefore ſhew Cauſe *Monday* next, why you ſhould not plead in Chief. *Style* 331. *Rogers* and *Done*.

What ſpecial Plea is good in Trover, what not, and when the general Iſſue ſhould be pleaded.

To an Action of Trover for divers Loads of Corn, the Defendant pleaded and intitled himſelf unto them as Tithes ſevered; and becauſe the Plea amounts but to a Not Guilty, the Plaintiff demurred, and ſhewed for Cauſe, That the Plea was not therefore good. *Henden*, Serjeant, would have maintained this Plea, becauſe it concerns Matter in the Realty, (*viz.*) Tithes, and Title is pleaded, as it were a Confeſſion of the Poſſeſſion in the Plaintiff, and as a general Bar in Action of Treſpaſs, and colour given; *ſed non allocatur*; for this Action comprehends Title in it; and a Plea which amounts but to a General Iſſue, is not allowable, it being ſpecially ſhewn for Cauſe of Demurrer; whereupon without Argument it was adjudged for the Plaintiff. 3 *Cro.* 157. *Lynnet v. Wood*.

In

In an Action upon the Case upon Trover and Conversion of Goods. The Defendant justifies the taking of them Damage-feasant, *absque hoc* he converted them *aliter vel alio modo*; and it was thereupon demurred in Law. For the Traverse is not good, because he confesses not any Conversion; the Plea also amounts to a *Non Culp*; Wherefore without Argument it was adjudged for the Plaintiff. 1 *Cro.* 435. *Dee v. Bacon.*

What Plea amounts to the General Issue.

In Trover and Conversion, supposing the Defendant sold the Thing for which the Action is brought, *Non vendidit* is no Plea, but the Defendant ought to plead *Non Culp* New *Benl.* 41. Lord *Mounteagle v.* the Countess of *Worcester.* *S. C. Dyer* 121. *S. C.* 1 *And.* 20.

Non Culp. is the general Issue in Trover.

In Trover for a Horse, the Defendant pleaded that he took the Horse to keep at Livery, and that the Horse died; but the Plea was held naught, because it amounted to no more than the General Issue. 1 *Roll. Rep.* 22. *Whitaker v. Collett.*

In Trover the Plaintiff supposed that he was possessed of divers Loads of Corn and Hay, at *H.* in the County of *M.* and that they came to the Hands of the Defendant by Trover, and he converted them to his own Use. The Defendant pleaded, That before the Trover he was seised of certain Land in *Burton* in the County of *Stafford*, in Fee, and the Corn and Hay was growing upon the Land, and he cut them as his proper Goods, and was possessed till he lost them; and they came to the Hands of the Plaintiff by Trover, and he lost them again, and they came to the Hands of the Defendant, and he converted, as it was lawful for him to do. And upon this the Plaintiff demurred in Law; for the Plea amounts but

What Plea in Trover good, and when the Defendant plead the general Issue.

to the general Iſſue; and this Cauſe was ſhewn for Demurrer. *Egerton* moved, That the Plea amounts to the general Iſſue, for it is no more than That they were his proper Goods, and then he ought to plead *Non Culp.* and if it be a Plea, he ought to traverſe without that they were the Goods of the Plaintiff; for the Plaintiff declared, That they were his proper Goods, and he ought to anſwer it. 25. *E.* 3. 9. 22 *E.* 3. 18. 30 *Aſſ.* 22. 11 *H.* 4. 78. *Atkinſon contra.* Altho' this Plea be but a general Iſſue, yet he ſhould not have demurred, but ought to have moved the Court (9 *H.* 6. 11. 19 *H.* 6. 21.) that he ſhould plead another Plea, or a *Nil dicit* be entred; for Demurrer being joined upon it, this is confeſſed, and then it is not to be adjudged for the Defendant. But the Court held, That inaſmuch as this is the ſpecial Cauſe ſhewn upon the Demurrer, it is good, and then ſhall be judged for the Plaintiff; and afterwards the Plaintiff had Judgment. 1 *Cro.* 146. *Warde v. Blunt.*

What Plea amounts to the General Iſſue.

In Trover of ſix Oxen in *London*, and there converted, *&c.* The Defendant ſaid he ſeized them in the Manor of *D.* in *Eſſex*, as Goods waived there, and ſo juſtifieth, *abſque hoc* that he was guilty in *London*: And *per Cur.* it was no Plea; for it amounts but to the general Iſſue, containing no Matter local, to make the Place material. 1 *Cro.* 174. *Bullock verſus Smith.*

The Converſion may be traverſed.

In Trover of an Horſe, and ſelling him, and converting the Money to his own Uſe. The Defendant confeſſeth, That is was the Plaintiff's Horſe, and that one *J. Courtnal* found and delivered him to the Defendant to reſtore upon Requeſt: Whereupon he redelivered

livered him to the said J. C. before the Action brought, *absque hoc* that he sold and converted him to his own proper Use. And it was thereupon demurred; because he ought to have pleaded the general Issue, and he could not traverse the Conversion. But all the Court held, altho' it was doubted in the Books 27 *H.* 8. 2. 33 *H.* 8. 4 *Ed.* 6. *Bro. Action sur le Case*, and *Dyer* 12. Yet forasmuch as in this Action the Substance is the Conversion, and without it the Action cannot be founded, yet it well might be traversed. But in Regard he hath here traversed the Conversion of the Money to his own Use, which is not materialy alledged in the Declaration, but is superfluous, and by his Traverse hath made it Part of the Issue; the Traverse therefore is ill in that Point; and the Demurrer being upon the Traverse, it was adjudged for the Plaintiff. 1 *Cro.* 554. *Kynnersly versus Bernard.*

In an Action upon the Case, the Plaintiff declared upon certain Corn, which came to the Hands of the Defendant, and that he converted it; and supposed the coming to be to his Hands in *London*. The Defendant said, that he was seized of certain Lands in *R.* in *Berks*; and that the Plaintiff did thereof him disseise, and sowed the Lands; and before Severance he himself re-entred, and took away the Corn, as was lawful for him to do; *absque hoc* that any Corn came to his Hands in *London*; and by the Opinion of the whole Court, the Traverse was holden to be good. 4 *Leon.* 262.

Traverse of the County in a local Justification is good.

Special Plea without Confeſſion of a Converſion, ill.

To an Action upon the Caſe on Trover of 300 Sheep, the firſt of *December*, 36 *Eliz.* The Defendant pleaded, That he was Sheriff of the County of *Lincoln*, and that *J. S.* recovered againſt the Plaintiff, 100 *l.* and thereupon had a *Fieri Facias* to levy that Debt; which Writ was returnable *Craſtino Animarum*. 35 *Eliz.* That this was delivered to him, being then Sheriff of the ſaid County, upon the 1ſt of *October*, 35 *Eliz.* to be executed; that he, by Force thereof, upon the 20th of *October*, 35 *Eliz.* took the ſaid 300 Sheep, and ſold upon the 22d Day of *October*, *anno* 35 *Eliz.* 100 and 4 Sheep for 40 *l.* Parcel of the ſaid 100 *l.* and that the other 192 Sheep, remained in his ſaid Hands *pro defectu Emptorum*. And on the ſaid Day of *Craſtin. Anim.* he returned the ſaid Writ accordingly, and all this Matter. The which is the ſame Converſion, *abſque hoc* that he converted *aliter vel alio modo*; and thereupon demurred: And after Argument the whole Court held the Plea to be inſufficient. Firſt, and principally, Becauſe he doth not by Plea confeſs any Converſion, and then the Traverſe is ill: But he ought upon this Matter to have pleaded Not Guilty, and have given it in Evidence. Secondly, Becauſe he ſuppoſeth the Trover and Converſion to be the firſt of *December*, 36 *Eliz.* and he juſtifies the Converſion in *October*, 35 *Eliz.* So he meets not with the Plaintiff in Time, and therefore he ought to have traverſed it: and the Traverſe *aliter vel alio modo*, ſhall never anſwer to the Time but to the Manner of the Converſion. Thirdly, He makes not any Juſtification for 4 of the Sheep, but that he ſeized them;

Non Culp', when to be pleaded.

The Time when to be traverſed.

Aliter vel alio modo, goes not to the Time.

but

but did not shew what he did with them: Wherefore the Plea doth not answer all that which is comprised in the Declaration; and for that Cause ill in all. And of that Opinion was all the Court, and appointed Judgment to be entred for the Plaintiff; but after caused it to be staid for the Equity of the Matter. 1 *Bro.* 4. *Ascue v. Sanderson.*

When the Statute of Limirations is a good Plea in Bar, when not.

In Trover and Conversion of a Ship and nine Pieces of the Plaintiff declared, That 1 *Martii* 21 *Jac.* he was possessed, and the same Day lost them, which came to the Defendant's Hands, who 3 *Octob.* 3 *Car.* converted them to his own proper Use. The Defendant pleaded the Statute of 21 *Jac.* of Limitation of Actions; and that the twentieth of *March*, 21 *Jac. causa actionis accrevit*; so as not only three Years, and more, are incurred since the Parliament, but also six Years after the Conversion, before any Action commenced. *Et hoc, &c.* The Plaintiff replied, That they were possessed of the same Ship, as their proper Goods; and so being possessed before the twentieth of *March*, 19 *Jac. viz.* 1 *Martii*, 19 *Jac.* they agreed at *London* aforesaid, *in Parochia & Warda prædicta*, That the said Defendant, as their Servant, should transport the said Ship and Goods to *T.* in *Spain*, being Parts beyond Seas, and should afterwards restore them unto the Plaintiff upon Request; whereupon the Defendant taking the said Ship, the said 1 *Martii*, 19 *Jac.* transported her to the Parts beyond Seas, *viz.* to *T.* and 20 *Martii*, 19 *Jac* there sold the said Ship and Goods to Persons unknown, and converted them to his proper Use; and that the Defendant

fendant, after the said Conversion, remained *in partibus transmarinis usque primum Maii*, 1 *Car.* by Reason of which Stay, they could not sue him *per Legem Terræ*; and that 1 *Maii*, 1 *Car. apud London*, they required him to redeliver the said Ship and Goods, which to do he refused. But the said Ship and Goods, *adtunc & ibidem*, converted and disposed *prout superius continetur*; *Et hoc, &c.* And upon this Replication, the Defendant demurs. And now *Henden*, Serjeant, moved, That this Action of Trover is not within the Statute, but omitted; for altho' at the first the Words be, Actions of Debt, Detinue, Actions upon Trover, Account, *&c.* shall be brought within the Time after limited; yet in the Percloſe, Actions *sur* Trover are not mentioned. But all the Court conceived, altho' the Actions of Trover are not mentioned in the Percloſe, yet the Words being, That Actions upon the Case shall be brought within six Years, and Actions for Words within two Years; in those general Words, Actions upon the Case, the Action of Trover is implied: Wherefore it was not allow'd. *Secondly*, Admitting the Defendant was beyond Seas for Six Years after the Conversion, and did not return into *England*; The Question was, Whether had the Plaintiff not Liberty to bring the Action at any Time within six Years after his Return? For the *Proviso* is on the Part of the Plaintiff, if he be over the Sea at the Time of the Cause of Action, that he shall have Time after his Return: And by the same Equity, it shall be so where the Defendant is over the Seas and cannot be sued. But that Point the Court did not resolve.

Construction of the Statute of Limitations.

Thirdly,

Thirdly, If this Request, and not Delivery after his Return, be not a new Conversion and Cause of Action; so that altho' he was barred before by the Statute of Limitation, whether he shall not hereby be restored to that Action? And *Jones* and *Whitlock* conceived, That he should; and that he may be well intended, the Goods came to his Hands again after his Sale; and the Demanding them of him, and his Denial and Conversion, is good Cause of Action. But *Croke* doubted thereof. Fourthly, It was argued, That here the Replication was a Departure from the Declaration; for by the Declaration he supposeth a casual Loss, and a Trover by the Defendant, and that to be 21 *Jac.* But in the Replication he supposeth to Restore; and then a Sale of them the twentieth of *March* 19 *Jac.* so it varies in the Time and Manner how the Defendant had them; also, by his own Confession, the Conversion was made above six Years before the Action brought. But altho' *Croke* doubted therein, yet *Jones* and *Whitlock* over-ruled, and gave Judgment for the Plaintiff; *absente Richardson*, Chief Justice. 3 *Cro.* 245. & 333. *Swayn & al' v. Stephens. S. C. W. Jones* 252.

Whether Request and Refusal is not a new Conversion.

Replication to the Statute of Limitations, if a Departure.

In Trover the Defendant pleaded a Release, &c. And it was held *per Holt*, Chief Justice, That in Trespass, if the Defendant pleaded a Release before the Time, he must also go on with an *absque hoc*, that he is Guilty *ad aliquod tempus postea*: But if he does not vary the Time, there needs no Traverse; for suppose you alledge the Trespass such a Day, and the Defendant justifies as to that Day, the Plaintiff may shew another Day, and it is no De-

In Trespass if the Defendant justifies upon the Day in *Narr'* the Plaintiff may alledge another Day in his Replication.

parture, for the Defendant has occasioned this; and there is great Difference between a Bond and a Trespass: If the Declaration lays the Bond to be dated on one Day, the Replication cannot say it was dated on another; but in Trespass the Plaintiff may depart according to Occasion; *sed adjournatur.* 1 *Salk.* 222. *Webley v. Ralmer.*

Bailment in Trover pleaded.

In an Action upon the Case upon a Trover and Conversion to his own Use, *per conditionem quibusdam hominibus ignotis*; the Defendant pleaded, That the Goods were bailed to him, to bail to *J. S.* to whom he had delivered them; *absque hoc* that he did convert them to his own proper Use, *per venditionem hominibus ignotis.* It was moved by *Egerton*, That that Matter is not traversable; *quod Wray concessit*; for the Conversion to his own Use, is the Cause and the Ground of the Action, and not the selling the Goods, *&c.* 2 *Leon.* 13.

Traverse ill.

Plea Bailment to keep till a Future Event happen'd.

In an Action upon the Case, the Plaintiff declared of Trover, of a Bag of Money, and the Conversion of it: The Defendant pleaded, That the Bag of Money was delivered to him as a Pawn to keep until *A.* and *B.* were agreed which of them should have it; and pleaded further, That *A.* and *B.* were not yet agreed who of them should have it; for which Cause he kept it; *absque hoc* that he converted it to his own Use, upon which the Plaintiff did demur in Law; it was moved that the Conversion is never traversable. *Wray*, Generally Conversion is not traversable, but upon such special Matter as is here; or if *A.* lend Money to *B.* and *B.* delivers a Thing of the Value to *A.* in Pawn; now the Conver-

With a Traverse of the Conversion.

ſion is traverſable. See the ſame Caſe, 4 *Ed.* 6. *Br. Action upon the Caſe*, 113. So here *Fenner* agreed with *Wray*. 1 *Leon.* 247. and Good.

An Action of Trover and Converſion was brought of Goods in *Ipſwich*; The Defendant pleaded, That the Goods came to his Hands in *Dunwich* in the ſame County; and that the Plaintiff gave unto him the Goods which came unto his Hands in *Dunwich*, *abſque hoc* that he is guilty of any Trover and Converſion of Goods in *Ipſwich*. And by the Opinion of this Court, the ſame is a good Manner of Pleading, by Reaſon of the ſpecial Juſtification. *Vide* 27 *H.* 6. But when the Juſtification is General, the County is not traverſable at this Day. *Vide* 19 *H* 6. 6. *&* 7. *Godb.* 177. *Strangden* and *Barnell's* Caſe. *S.C.* 4 *Leon.* 106. Plea a Gift by the Plaintiff in another County, and good.

Galliard brought a Action upon the Caſe againſt *Archer*; the Plaintiff declared, That he himſelf was poſſeſſed of certain Goods, which by Trover came to the Hands of the Defendant, who had converted them to his own Uſe. The Defendant pleaded, That before the Trover ſuppoſed, one *A.* was poſſeſſed of the ſame Goods as of his proper Goods, and ſold them to the Defendant; and that he had not any Notice that the ſaid Goods were the Goods of the Plaintiff; upon which the Plaintiff did demur in Law. And by *Anderſon* the Plea is not good; for the Plaintiff may chuſe to have his Action againſt the firſt Finder, or againſt any other, which get the Goods after the Sale, Gift, or Trover: And by ſome, the Defendant having the Goods by Sale, might Traverſe the finding. See *Contr.* 27 *H.* 6. 13. *a.* And ſee by ſome, in Detinue, where Plea Sale to the Defendant by *A.*

Trover lies againſt the firſt Finder, or any other Perſon.

where the Plaintiff declares of a Bailment, the Defendant may ſay, That he found them, and traverſe the Bailment. 39 *H.* 6. 37. by *Moyle*: And by *Wyndham*, Juſtice, the Defendant may traverſe the Property of the Goods in the Plaintiff. 12 *E.* 4. 11. 1 *Leon.* 189. *Galliard* and *Archer*'s Caſe.

Plea of Property in the Defendant, and Sale before the Action, whether good?

In an Action upon the Caſe, on Trover and Converſion of 16 Broad Clothes; the Defendant pleads, That before the Time of the Trover and Converſion, one *Mortice* was poſſeſſed of thoſe Goods, and ſold them to the Defendant; and before he had Notice that they appertained to the Plaintiff, he ſold them to *J. S.* the which Matter, *&c.* and it was thereupon demurred. 1 *Cro.* 480. *Gybſon v. Garbyn.* See 2 *Bulſt.* 134, & 209.

Plea, Sale in Market-Overt.

Action *ſur* Trover *apud Paxton in Com. Hunt.* the Defendant pleads a Bargain and Sale *apud Royſton in Com. Hert.* in the Market there, whereby he after converted them *apud P. in Com. H.* The Plaintiff ſaith, That he was poſſeſſed of thoſe Goods *apud P. in Com. H.* and that *J. S.* there ſtole them from him; and by Covin betwixt him and the Defendant, at *P.* in the County of *H.* he ſold them to the Defendant, as he had pleaded. The Iſſue was upon the Sale made by Covin, *&c.* and it was tried in the County of *H.* and found for the Plaintiff; and it was moved to be a Miſtrial, for it ought to have been by a Jury of the County of *Hertf.* or at leaſtwiſe by a Jury of both Counties. And of that Opinion was *Gawdy*. But the other Juſtice *e-contra*; for the Sale is confeſſed, and the Iſſue is upon the Covin, which is well tried by

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a Jury of the County of *Hertf.* where it was alledged. And it was afterwards adjudged accordingly. 1 *Cro.* 510. *Harbing v. Sherman. Goldſ.* 158. *S. C.*

In an Action of Trover for a Gelding, the Caſe was: Plea, Sale in Market Overt.

One *Porter* ſtole this Gelding from the Plaintiff, and ſold him to the Defendant in open Market, by the name of *Leiſter*, and it was entred ſo in the Toll-Book, that *Leiſter* ſold him.

The Queſtion was, If this Alteration of the Name ſhall not make any Alteration of the Property, altho' the Sale was in open Market? What Sale in Market-Overt will alter the Property.

Wyndham and *Rhodes*, Juſtices, held this no good Sale to bar the Plaintiff, and ground their Opinion on the Statute of the 2 & 3 *Phil. & M. c.* 7. which provides, That no Property of ſtol'n Goods ſhall be altered that are ſold, unleſs the Name and Surname of the Parties to the Sale be written in the Toll-Book: And *Shuttleworth* moved, That it ſhould be in the Market, and walked there for an Hour together, which is not ſet forth by the Defendant in his Bar. But the Juſtices ſaid, That ſuch ſpecial Plea need not to be but ſhall be intended. *Owen* 27. *Gibb*'s Caſe.

In an Action of Trover and Converſion of Goods, the Defendant ſaid, That *J. S.* was poſſeſſed of the ſaid Goods, and ſold them unto him in open Market. *Quare* whether it be a good Plea, becauſe it doth amount to the general Iſſue of Not Guilty? *Curia adviſare vult.* and *vid. Tompſon*'s Caſe. 4 *Jac.* in the King's Bench, it was adjudged that it was no good Sale in Market-Overt.

good Plea. *Godb.* 267. *Biſſe* and *Tyler*'s Caſe. S. C. 1 *Roll. Rep.* 273. See 4 *Cro.* 68. & 165. *Hetley* 49, & 62. *Moore* 624.

Sale in Market-Overt pleaded and allow'd to be pleaded.

In an Action *ſur* Trover, a Preſcription was alledged in *London*, That every Shop in *London* ſhould be ſaid to be a Market-Overt for all Wares there ſhall be ſold; which the Court upon the firſt Motion conceived to be too general and unreaſonable a Cuſtom. And *Anderſon* ſaid, It had been argued, That if one buys in a Shop any Thing which appertains not to his Trade; as to buy Plate in a Mercer or Draper's Shop, it is not a Market-Overt as to that Purpoſe. So if the Sale be in a Back Shop, or in another Place, not open, no Property ſhall be changed by ſuch Sale. 1 *Cro.* 454. *Palmer v. Welley.* 5 *Co.* 83. *b.* S. C. See *Golds.* 158. a like Plea pleaded.

To what Purpoſes a Shop is a Market-Overt.

Plea of the Cuſtom of Market-Overt.

In an Action on Trover of a Silk Quilt, a Teſter of a Bed, five Silk Curtains, a Petticoat and a Cloak. The Defendant *Quoad* all beſides the two laſt, pleaded Not Guilty; *Quoad* them he pleaded, That the City of *London* is an antient City, and that within the ſame is a Market every Day for all Goods to be ſold in every Part of the City, in every open Shop, every Day beſides *Sundays* and Holidays, betwixt Sun-riſing and Sun-ſetting, ſo as one of the Contractors be a Freeman: And That he being a Freeman of the Company of Mercers, ſuch a Day not being a *Sunday* or Holiday, bought thoſe Things in his open Shop, wherein he uſed to buy ſuch Wares of one *Henry Cooper*, for ſuch a Sum, and ſo juſtifies the Converſion; and upon this Plea the Plaintiff demurred: And upon the firſt Motion at the Bar, all the Court conceived that the

the Plea was not good; for the Cuſtom is too general, that every Freeman might buy all Manner of Wares in every Shop, *&c.* for then a Scrivener might buy Plate in his Shop, and the like, *&c.* which is not reaſonable; and here, he being of the Myſtery of Mercers, to buy Petticoats and Cloaks, *&c.* it is not agreeable to his Trade. And *Popham* ſaid, That it had been reſolved, That ſuch Cuſtom being found by a Special Verdict, was unreaſonable. Wherefore it was adjudged for the Plaintiff. 2 *Cro.* 68. *Taylor v. Chambers.*

How the Cuſtom ought to be alledged.

Action *ſur* Trover; the Defendant pleaded, That before the Time, wherein the Plaintiff ſuppoſes the Goods to come to the Defendant's Hands, one *S. A.* was poſſeſſed of them; and amongſt other Goods ſold them to the Defendant, but retained them in his own Hands, and afterwards ſold them to the Plaintiff, by Reaſon whereof the Plaintiff was poſſeſſed, and afterwards loſt them, and they came to the Defendant's Hands, who converted them *prout, &c.* Whereupon the Plaintiff demurred; and it was held by the Court to be an ill Plea; for it amounts to a Not Guilty: And it was doubted whether the Court ſhould compel the Defendant to plead not Guilty, or award a Writ of Inquiry? But at laſt it was reſolved, That a Writ of Inquiry ſhould be awarded. 1 *Bro.* 5. 2 *Cro.* 319. *Auſtin v. Auſtin.*

Plea of Sale ill for amounting to the general Iſſue.

So has a Plea of Sale in Market-Overt been adjudged ill for amounting to the general Iſſue. 2 *Cro.* 165. *Johnes verſus Williams.*

Sale in a Fair, how to be pleaded.

In Trover of 9 Oxen *apud Stepney* in *Com'. præd.* 29 *Aug.* 37 *El.* and converted them to his proper Uſe, the ſame Day at the ſame Place, *&c.* The Defendant pleads, That the Vill of *Crawley* in *Com. Suſſex* is, and Time whereof, *&c.* was an antient Vill, within which *habetur & tenetur*, and Time whereof, *&c.* hath been held one Fair every Year upon the 29th Day of *Auguſt* for all the Queen's Subjects thither reſorting. *Et quod ante tempus quo, &c. (viz.)* the ſaid 29 of *Auguſt* 37 *Eliz.* one *William White* was poſſeſſed of thoſe nine Oxen, and them to the Defendant for 28 *l.* the ſaid 29th of *Auguſt*, in open Fair, ſold and delivered, whereby he was of them poſſeſſed, as of his proper Goods, and them converted at *Stepney* in *Middleſex* the ſame Day in the Declaration, *prout, &c.* And it was thereupon dumurred. Firſt, Becauſe the Declaration ſuppoſeth the Property of thoſe Goods to be in the Plaintiff, and the Defendant doth not confeſs, nor deny it, nor anſwer thereto: But the Court held, That this Plea was good enough as to that; for when he juſtifies by Buying in a Market-Overt, it is thereby allowed that the Property was in the Plaintiff; but he is bound by that Sale, and he needed not otherwiſe confeſs it. Secondly, The Preſcription is alledged, That there had been a Fair in that Vill, and he doth not alledge it to be in any certain Perſon, *&c.* But it was held to be good; for he need not take Conuſance in whom it is; and ſo is the uſual Courſe of Pleading in ſuch Caſes. Thirdly, He alledgeth the Preſcription to be to hold a Fair there every Year upon the 29th of *Auguſt*; and he doth not except *Sunday*, as it ought to be. *Sed non allocatur*; for

for a Fair holden upon a *Sunday*, is well enough. Altho' by the Statute there is a Penalty inflicted upon the Party that ſells upon that Day, but it makes it not to be void. Fourthly, It is not alledged here that any Toll was paid, for otherwiſe the Property is not changed. 12 E. 4. 8. 35 H. 6. 29. *Dyer.* 99. *Sed non allocatur*; for it is not of Neceſſity; and in many Vills no Toll is uſed to be paid; and if it ought, it ſhould be ſhewn on the other Part to avoid the Sale, that there was not any Toll paid. Fifthly, It is not alledged, That *William White* was poſſeſſed of thoſe Goods, as his proper Goods; nor that he had any Property in them; but generally, That he was poſſeſſed of them, and ſold them; *ſed non allocatur.* And notwithſtanding theſe Exceptions, and others, it was adjudged for the Defendant. 1 *Cro.* 485. *Comyns v. Boyer.*

How a juſtification by *Fieri Facias* ſhould be pleaded.

In Trover and Converſion of Goods *apud D. in Com. Nott.* The Defendant ſaith, That he recovered againſt the Plaintiff a Debt of 20 *l.* by Bill in the King's Bench, and thereupon had a *Fieri Facias* directed to the Sheriff of *York*, who *apud Wakefield, in Com. Eborum*, ſeiſed thoſe Goods, and delivered them unto him in Satisfaction of this Execution; and ſo juſtifies the Converſion. And it was thereupon demurred, and without Argument ruled, That the Pleading was ill. Firſt, Becauſe he ſhewed not where the Queen's Bench was at the Time of the Recovery. It being a Court removable; as 5 *Ed.* 4. 8. is. Secondly, the Trover and Converſion is ſuppoſed to be in the County of *Nott.* and he juſtifies in the County of *York*, without traverſing, *&c.* Thirdly, The Sheriff upon a Writ of *Fieri Facias* cannot

deliver the Defendant's Goods to the Plaintiff in Satisfaction of his Debt. Wherefore it was adjudged for the Plaintiff. 1 *Cro.* 504. *Thomſon v. Clerk. Noy* 56. *S. C.*

How to juſtify the taking Goods that are waived.

In Trover of Goods, the Defendant juſtifies, as Servant to the Sheriff of *Middſeſex*, becauſe the Plaintiff had ſtol'n thoſe Goods, and carried them to *D.* within the County of *Middleſex*; at which Place the Defendant ſeiſed them *ut Bona waviata*; and without Argument it was adjudged for the Plaintiff; for he ought to alledge a Felony committed; and, that the Goods were waived by the Felon: But it is not alledged that the Felon waived them. Wherefore it was adjudged *ut ſupra.* 1 *Cro.* 611. *Davies*'s Caſe.

Plea of Seiſure, becauſe they were *Bona waviata*, how to be.

In Trover and Converſion of twenty Sheep; the Defendant pleaded, That the Queen was, and yet is ſeiſed of the Manor of *Newport-Pagnol*, in the County of *Bucks*; and that *Malefactores ignoti* ſtole thoſe Sheep from the Plaintiff, and brought them within the ſaid Manor, and there waived them: Whereupon the Defendant, as Bailiff to the Queen of her ſaid Manor, ſeiſed them as the Queen's Goods, to the Queen's Uſe, which is the ſame Trover and Converſion, and prays in Aid of the Queen. Whereupon the Plaintiff demurred ſpecially. *Crew*, for the Plaintiff, moved, That the Plea was not good; Firſt, Becauſe it concludes with an *Aide praier* in this Action, which being Perſonal and Poſſeſſory, and for a Chattel only, is not good; and herein Aid is not grantable. *Vide* 11 *H.* 4. 14. *H.* 6. 5. Secondly, he juſtifies for a Seiſure, and anſwers not to the Converſion, which is the chief Matter in this Action; and the Seiſure

Seiſure is not any Converſion, and therefore he ought to have anſwered or traverſed it; as 7 *H.* 6. 13. in Conſpiracy he juſtifies, That he gave Evidence to the Jury by Command of the Juſtices; and it was ruled to be no Plea; for that is not any Conſpiracy. Thirdly, The Plea is not good; for when one juſtifies the Seiſure of Goods, as waived, he ought to ſhew, That Purſuit was made after the Felon, and that he waived them; for otherwiſe they be not waived. *Brook Eſtrays*, 9. 29 *E.* 3. 29. 44 *E.* 3. 19. And ſo is the 37 *H.* 8. Wherefore, *&c.* *Gawdy* and *Popham* held, That the Plea was not good; for that the Converſion was not anſwered: He alſo ought not to have Aid, becauſe it is but a Chattel; he hath not alledged, that he hath anſwered for them to the Queen; but that he needed not to have alledged any Purſuit of the Felon. For *Popham* ſaid, It ought to be alledged that the Felon fled; for that he was in fear to be apprehended, and for that Cauſe waived them: For if a Felon carries away Goods, which he hath ſtole within a Manor, and leave them there, and at another Time goes away, the Goods are not waived; for waiving ſhall be where he hath the Goods when he flies for Fear to be apprehended for them. And the Reaſon of the Forfeiture is, becauſe there was a Default in the Party robbed, that he did not purſue him to have taken the Goods from him, and therefore the Law gives them to the Queen. But it is not neceſſary, that he be purſued for the Felony, when he leaves the Goods, ſo that he flies for this Cauſe. But afterwards, becauſe the Plea was not in Bar, but concludes, *ſi Regina inconſulta, &c.* they all reſolved, That

the Judgment could not be in Matter of Bar. And becauſe Aid was not grantable in this Caſe, it was awarded, That he ſhould anſwer without Aid. And ſo it was adjudged. 1 *Cro.* 693. *Foxley v. Anneſly.* 4 *Co.* 109. *S. C.* And *Moore Rep.* 572.

How to juſtify the deraining Cattle as an Eſtray.

In Trover and Converſion of a Cow *apud Salop.* The Defendant pleaded, That the Queen was ſeiſed in Fee of ſuch a Manor, and demiſed it, and all Eſtrays therein, *&c.* to *J. S.* for Life, and conveys it by mean Conveyances to himſelf; and that this Cow came thither as an Eſtray; whereupon he ſeiſed her, and cauſed her to be proclaimed in two Market-Towns next adjoining. And the Plaintiff claimed Property; and the Defendant demanding of him to pay for her Feeding, that he refuſed, and thereupon he denied to deliver the Cow, and traverſes that he is Guilty of the Converſion, *apud Salop.* And it was thereupon demurred; Firſt, Becauſe he ſhewed not the Letters Patents. Secondly, Becauſe he alledged not, That the Proclamations were made in the Pariſh-Church. Thirdly, Becauſe he traverſeth the Vill; and it was adjudged for the Plaintiff. 1 *Cro.* 716. *Brownlow v. Lambert.*

Special Juſtification of Diſtreſs, ill.

Action of Trover and Converſion of Goods in *London.* The Defendant juſtifies, for that one *Robert Baſh* was ſeiſed in Fee of 20 Acres in *Stanſtead*, in the County of *Hertford*, and granted a Rent-Charge to *Robert Baſh*, his Executors and Aſſigns of 16 *l. per Annum*, during the Life of *Frances*, the Wife of *Robert Baſh*; which *Robert Baſh* died Inteſtate, and *Frances*, his Wife, was Adminiſtratrix unto him; and the Defendant, as her Servant, took a Diſtreſs in the ſaid 20 Acres, for the ſaid

ſaid Rent, by the Command of the ſaid *Frances*, and impounded them there, and traverſes the taking and Converſion of them in any other Place. And it was thereupon demurred, and all the Court held the Plea to be ill; for the Inducement to the Traverſe (which ought always to be good) is not a ſufficient Cauſe of Juſtification for the taking of the Diſtreſs; for this Rent was determined by the Death of *Robert Baſh*, becauſe there cannot be an Occupant of Rent. And the Feme is not Aſſignee by her taking of Adminiſtration; for none can make Title to a Rent to have it againſt the Terre-tenant, unleſs he be Party to the Deed, or conveys a ſufficient Title under it. Wherefore it was adjudged for the Plaintiff. And whereas Exception was taken to the Plea, becauſe he traverſed the County, the Court did not ſpeak thereto; for that they reſolved the Subſtance of the Plea to be inſufficient. 1 *Cro.* 901. *Salter v. Butler. Noy*, 46. *S. C. Yelv.* 9. *S. C. Moor.* 664.

Becauſe the Inducement to the Traverſe is not good.

In an Action of Trover and Converſion, the Plaintiff declared, That he was poſſeſſed of divers Goods, naming them, and caſually loſt them, which came to the Defendant's Hands, 1 *Octob.* 5 *Jac.* 1. and that he converted them to his own Uſe: The Defendant pleaded, That before the Plaintiff had any Property in them, *William Dickinſon*, of *New-Malton in Com. Ebor.* was poſſeſſed of them as of his own Goods; and that ſuch a Day *Anno quarto*, and for a good Conſideration in Law, gave them to the Defendant, who thereby was poſſeſſed of them; who 1 *Maii*, *Anno quinto*, loſt them, and that 2 *Maii*, *Anno quinto*, *præd.* they came to the Hands of *William Dickinſon* of *London*, who the ſame Day gave them to the Plain-

Plaintiff, who thereby became poſſeſſed of them, and loſt them, 1 *Octobris, Anno Sexto*; and ſo they came to the Hands of the Defendant, who converted them to his own Uſe, as his own Goods; on this Plea the Plaintiff demurred; and 'twas adjudged that the Plea was not good, becauſe it neither confeſſes and avoids nor traverſes the Title the Plaintiff alledged to the Goods in the Declaration, but only gives the Plaintiff a Colour of Poſſeſſion, but not of a Right or Property, and that on a void and defeazable Gift, made to him by *Dickinſon*; and a Difference was taken between this Action and Treſpaſs; for in Treſpaſs a Colour of Poſſeſſion given to the Plaintiff by the Defendant, ſufficeth, becauſe the Declaration is general on a Suppoſal, without Title in Certain; and a Colour of Poſſeſſion is a ſufficient Anſwer to a Suppoſal; but in all Actions where a Title appears in Certain, as in Trover to thing demanded, for which Damages are demanded, the Defendant muſt make to himſelf a better Title, and traverſe the Plaintiff's Title, or confeſs and avoid the ſame, as 4 *Jac. in Banco Regis*, it was adjudged in Trover for Goods where the Defendant claim'd by Title paramount, and pleaded that *A.* bailed them to the Plaintiff to keep, who thereby became poſſeſſed, and that he took them from the Plaintiff, *prout ei bene licuit*, being his own Goods; and 'twas adjudged no Plea for the ſame Reaſon, *viz.* Becauſe it anſwers the Plaintiff's Title with Colour of a Poſſeſſion. *Yelv.* 173. *Prieſtly v. White.*

Confeſs and avoid Traverſe.

Colour.

In Trover, the Defendant pleaded, That he took them as Bailiff of the King, for Diſtreſs upon a Plaint *in Curia Manerii*, and ſold them;

Sale by Vertue of a Diſtreſs in a Court-Baron, not good.

them; and it was thereupon demurred, and adjudged null; for upon a *Distringas*, the Cattle shall not be sold, especially in a Court-Baron, altho' it were in the King's Court. 2 *Cro.* 255. *Gomersal v. Wyats. S. C. Yelv.* 194.

Plea taken for Prisage.

In Trover and Conversion for two Tun of Wine, the Defendant pleaded, That the King *Jure Coronæ*, was seised in Fee of Prisage of all Wines imported, *ex partibus transmarinis*, by any Person, whether a Subject or Alien; and that the Prisage was *a tempore cujus, &c.* answered to the King, his Progenitors, their Farmers or Deputies, in the Manner following, *viz.* Out of every Vessel, importing into any Port, or other Place within this Kingdom, 20 Tun of Wine for any Person *a partibus transmarinis*, and of that or *de aliquo vase inde vini prædict.* unloading a Tun, and out of every Vessel so importing 20 Tun of Wine for any Person into any Port or other Place within this Realm; and *inde seu de aliquo inde vase prædict. disonerat.* 2 Tun of Wine, *viz.* one before the Mast of such Ship, and the other behind the Mast *ejusdem navis*; and that the King being so seized before the Time that two Tuns came to the Defendant's Hands, as the Plaintiff supposes, *viz.* 21 *Sept. Anno* 5. by his Letters Patent, *hic in Cur. prolat'*, granted to Sir *T. Waller*, the Office of Chief Butler, to him the King, his Heirs and Successors, with all the Fees, *&c.* who was constituted thereby Chief Butler, *Habendum, &c.* for Life, to be exercised by him or his Deputy, *& ulterius dicit*; that the Chief Butler for the Time being used and accustomed by himself or Deputy, to collect and receive to the King's Use the said Prisage, due as aforesaid: And also, That the said

ſaid 13 Day of *April*, *Anno* 7 *quædam navis*, loaden with 20 Tuns of Wine, came to the City of *Exeter*, aforeſaid, *a partibus &c. Scil't a Villa de Bourdeaux in Gallia*; and that at the City aforeſaid, 9 Tuns and a half of the ſaid 20 Tuns being the Plaintiff's Wine, *adtunc exonerat. fuerunt ex navi præd. per quod* 2 Tuns of Wine were due to the King for Priſage; and being *legitime conſtitutus* Deputy to Sir *T. Waller*, *tunc & adhuc* Chief Butler, *& per ejus præceptum* the aforeſaid two Tuns *Vini præd. pro priſagio dicto* 13 *die April. anno* 7. *præd.* at the City of *Exeter*, to the Uſe of the King did take, and them to the King's Uſe convert and diſpoſe; *prout ei bene licuit quæ eſt eadem Converſio, &c.* that the Plaintiff ſuppoſes to be to the Defendant's Uſe, *& hoc paratus eſt verificare*: To this Plea the Plaintiff demurred; and four Exceptions were taken to it.

Firſt the Defendant ſets forth, That there was but 9 Tuns and a half of Wine unloaded, and by the Plea claims only one out of Ten that are unloaded; and therefore cannot juſtify the taking two, unleſs he had ſhewn 20 were unloaded.

Secondly, It is not ſhewn by the Plea, That the Defendant took one before the Maſt, and the other behind it, and yet has ſhewn by his Plea that the Cuſtom is in that particular Manner; and where the King has any Duty by Cuſtom, the Manner in which the Cuſtom gives the Duty, is to be followed.

Thirdly, The Defendant don't traverſe the Converſion to his own Uſe alledged in the Declaration, but juſtifies a Converſion to the Uſe of the King, which is a different Converſion from that the Declaration charges the Defendant with.

Fouthly,

Fourthly, The Defendant don't ſhew that the Office of Chief Butler is an Antient Office, to which a Cuſtom by length of Time may be annexed, but only ſhews a Grant to Sir *T. Waller*; ſo that it ſhall be intended a New Office, and to ſuch no Cuſtom can be annexed; nor does it appear how the Defendant was made Deputy. Yet it was reſolved, *per totam Curiam*, That the Plea was good, and Judgment was given for the Defendant; as to the firſt and ſecond Exceptions, 'twas anſwered by the Court, That if a Merchant import 20 Tuns, tho' he unlade only Part, the Bulk being once broke, the King ſhall have his Priſage; and this appears by an infinite Number of Precedents in the Exchequer: 'Twas alſo reſolved, That altho' by the King's Prerogative, one Tun before the Maſt, and another behind it were due, yet is not the King neceſſitated to take it in that Manner, but may take which two Tuns he pleaſes, for two Tuns are his due by Law, and that is the Subſtance; and were the Cuſtom to be otherwiſe underſtood it would be miſchievous; for that Tun that is to Day before the Maſt, by the Merchants Contrivance may be made the laſt in the Ship; and therefore if the Merchant unlade but one Tun, the Officer ſhall ſeize the two immediately, elſe might the Merchant conſtrain the Officer to attend him from Port to Port all over *England*. And *per Cur'*, As this Caſe is, there is no Occaſion either to traverſe the Converſion, or to plead to it otherwiſe than is here done; becauſe,

1. The Defendant confeſſes that the two Tuns of Wine came to his Hands as the Plaintiff alledges, but to the Uſe of the King; and this

this is Matter of Law on which the Court is to judge; and being Matter of Law ought never to be traverſed.

2. If the taking by the Defendant, to the Uſe of the King, were adjudged unlawful, then would he himſelf be guilty of the Converſion, becauſe he hath confeſſed the taking Poſſeſſion of the Goods. As to the fourth Exception, 'twas reſolved, That tho' the Defendant had not ſhewn that the Office of Chief Butler was an antient Office, yet it is good; for having pleaded a Seiſin in the King *Jure Coronæ* in Fee, it muſt neceſſarily follow, that the Office and Duty are co-eval it being inconſiſtent with the Royal Dignity for the King to collect them himſelf; beſides, the Title to the Office is not in Queſtion, but only uſed to excuſe the Defendant's taking the Goods of another for the King's Duty; nor is it neceſſary for the Defendant to ſhew how he was made Deputy, becauſe the Defendant claims no Intereſt, but juſtifies in another's Right, *viz.* Sir *T. Waller*'s; and the Words *Legit. Deput.* are ſufficient to inform the Court that he had Authority to collect the Priſage. *Yelv.* 198. *Kenicot v. Bogan.* It appears by *Salkeld*'s *Rep.* p. 654. that the late Lord Chief Juſtice *Holt* held, That this is the only good Special Plea extant in our Books.

Plea Foreign Attachment.

In Trover and Converſion, the Plaintiff declares, That whereas he was poſſeſſed of a Bag of Hops, and a Bag of Flax, to the Value of, *&c.* and that the Defendants found them, and the third Day of *October* converted them; and the Defendants pleaded, That *Sandwich* is an ancient Village, and that the Cuſtom of Foreign Attachments is uſed there as in *London*,

and that these Goods were lost upon Default in *November*, and traversed; *absque hoc* that they were Guilty of any Conversion in *October*, or any other Time or Day than the Times before, which are contained in the Declaration, That the Defendants were not Guilty before (*Scil.*) *October*; Upon which the Plaintiff demurred, and Judgment was given for the Plaintiff, altho' it was objected, That the Justification here, by the Custom afore, had taken away the Property; and it shall be debarred in Detinue, and so in Trover: But the Court was of the contrary Opinion, That the Defendant's Plea in Bar here shall not be good without Traverse, as it is; and therefore the Time is not made material; but any Time before is sufficient. Meer Possession sufficeth to maintain a Trover. *Het.* 166. *Green* against *Bronker* and *Greenstead.*

Of a *Non vult prosequi* to Part of the Plea, and proceeding to Trial *pro residuo.*

Sir *John Sands* brought an Action upon the Case against *Packsal Brocas*, upon a Trover of Goods and Houshold-stuff; the Defendant pleaded as to one Parcel, That they were fixed in his Freehold, in *S.* in *Hampshire*; *absque hoc* that he found them in other Manner; as to one Part, that the Plaintiff gave them to him at *D.* in *Hampshire*; and as to the other Part, he pleaded not Guilty: For the first Part, the Plaintiff caused to be entred a *Non vult' ulterius prosequi*, and took Issue upon the two other, and it was found for the Plaintiff by several Juries, in several Counties, and Damages and Costs assessed by the Juries: And now the Defendant brought Error. And assigned Error; 1. Because the Plaintiff as to the first had entred *Non vult. ulterius prosequi*, which is a Nonsuit; and Nonsuit in Part, is Nonsuit in all.

Anderson,

Anderſon, It is a Queſtion if this be a Nonſuit? The Entry is, *Querens venit, & gratis conceſſit* that as to the Goods mentioned in the firſt Pleas, *Non vult ulterius proſequi, Ideo conſideratum eſt quod nihil de iiſdem verſus* the Defendant, *fiat, & ille & pleg' in miſeric'*; and the Defendant, *eat inde ſine die. Periam*, A Nonſuit is, when the Plaintiff is demanded and doth not appear; but when he comes into Court, and ſaith, *quod non vult. ulterius proſequi*, the ſame is a *Retraxit*. *Nelſon*, Prothonotary, Nonſuit is upon Default, but here the Plaintiff appears; and this is the uſual Form of Entry of a *Retraxit*. Another Error was aſſigned, Becauſe both Juries have aſſeſſed Coſts, and Judgment given accordingly; whereas the laſt Verdict ought to do it: And where two Juries are to try the Iſſue, the Form of the Entry of the firſt Verdict is, *Ceſſet executio* until the other Iſſue is tried. *Vid.* 21 *H.* 6. 51. 36 *H.* 6. 13. *Anderſon*, Several Iſſues cannot ſever Coſts; and altho' they may the Damages, for it is but one Suit, therefore but one Coſts; and that is the Reaſon that Judgment ſhall not be given until the laſt Iſſue be tried, becauſe that Coſts ſhall be once aſſeſſed, which was granted by the whole Court: And by *Periam*, The firſt Jury may aſſeſs Coſts for the whole Suit, *quod fuit conceſſum*. *Coke*, Here are ſeveral Judgments for the Coſts; and altho' it be void for the latter Iſſue, yet it is good for the firſt. *Periam*. How ſhall it appear to us which was the firſt Verdict, and which the laſt? Altho' that the one Verdict was entred of Record before the other, the ſame doth not make it appear that it was firſt given; wherefore the whole ſhall be reverſed. 2 *Leon.* 177. Sir *John Sands* and *Packſal Brocas*'s Caſe.

In an Action upon the Case upon a Trover, the Defendant after an Imparlance pleaded an Outlawry of the Plaintiff: And it was holden by some to be a good Bar, and therefore it may be pleaded after Imparlance; as 16 *E.* 4. 4. in Debt upon Specialty; but not in Debt upon a Contract, Trespass, Battery, Imprisonment, *&c.* for such Matters the King shall not have by Outlawry. 3 *Leon.* 235. *Markham* and *Pitts*'s Case. Outlawry after Imparlance pleaded in Bar.

In an Action upon the Case, the Plaintiff declared, That he was possessed of certain Chattels, which came to the Defendant by Trover; the Defendant pleaded, That heretofore the Plaintiff brought Debt against the now Defendant, and demanded certain Monies; and declared, That the Defendant bought of him the same Goods (whereof the Action is now brought) for the Sum then in Demand, to which the then Defendant waged his Law, and had his Law, by which *nihil Capiat per breve, &c.* was enter'd; and demanded Judgment, if, *&c.* And by *Wyndham* and *Rhodes*, Justices, The same is no good Bar in this Action; for the waging of the Law, and the doing of it, utterly disproves the Contract supposed by the Declaration in the said Action of Debt, and then the Plaintiff is not bound by the Supposal of it, but is at large to bring his Action; and so Judgment was given for the Plaintiff. 2 *Leon.* 37. *L. Sands* and *Cagnard*'s Case. Plea Bar by Wager of Law in a former Action of Debt on simple Contract, is no Bar in Trover, and why.

Trover and Conversion *in Communi Banco*; for the Defendant we pleaded Judgment *in Banco Regis* upon Special Verdict in Trespass for the same Goods; and the Goods in the one and the other were the same, and Conversion Judgment in Trespass is a good Bar in Trover.

verſion and Taking the ſame, *&c.* The Plaintiff demurred; and upon Argument the whole Court were of Opinion, That it was a good Bar, upon the Authority of *Ferrer*'s Caſe; and that notwithſtanding the Caſe of *Putt* and *Royſton*, *in Banco Regis*, adjudged by *Pemberton contra*; which Caſe my Lord Chief Juſtice *Pollexfen* ſaid he was never ſatisfied with, and as he remembred a Writ of Error was brought, and the Judgment queſtioned; but afterwards agreed, That he ſaw no Difference between a general and a ſpecial Verdict. However they all thought a Judgment in the one a Bar to the other; for that the Actions were of the ſame Nature: And Judgment for the Defendant. *Show.* 146. *Lechmore verſus Toplady, & al'.*

Judgment againſt one is a good Bar to an Action brought againſt another for the ſame Things.

In Trover the Defendant pleaded, the now Plaintiff had brought an Action for the ſame Things againſt *T. S.* and obtained Judgment and Execution, and avers they were the ſame Things; and on Demurrer Judgment was given for the Defendant. And a Diverſity was taken by the whole Court where the Demand and Recovery is of a Thing certain, or of one that is incertain; for if two are jointly and ſeverally bound in a Bond of 100 *l.* there Recovery and Execution againſt the one, is no Bar to an Action againſt the other; for it is no Satisfaction of the 100 *l.* 4 *H.* 7. 22. But where two commit a Treſpaſs which lies intirely in Damages, there a Recovery and Execution againſt the one, is a good Bar againſt the other: Nay, 'twas agreed, That the very Judgment was a ſufficient Bar, *quia tranſit in rem judicatam*; and the Incertainty is reduced by the Judgment to a Certainty, and ſo altered

and

and changed from what it was; therefore the Plaintiff cannot reſort back to the Original Incertainty of the Thing demanded; ſo is Judgment in Battery againſt one a good Bar to an Action brought againſt another for the ſame. *Yelv.* 67. *Brown v. Wooton.*

Whether Trover lies after the Plaintiff had been barred in Action of Treſpaſs for the ſelf ſame Things.

An Action of Treſpaſs was formerly brought for taking of Goods, *&c.* and upon Not Guilty pleaded, the Defendant had Verdict. The ſame Plaintiff now brought a Trover againſt the ſame Defendant for thoſe Goods.

The Defendant pleads in Bar the Judgment in the former Action of Treſpaſs; upon a Demurrer, the Queſtion was, Whether a Judgment in Treſpaſs *Vi & Armis* may be pleaded in Bar to an Action of Trover for the ſame Goods?

This Caſe was argued by Mr. *Saunders* for the Plaintiff; and by Mr. *Pollexfen* for the Defendant.

And to prove that it was no Bar, a Caſe was cited to be adjudged in the Common Pleas, in the twentieth Year of King *James*, which was an Action of Trover and Converſion of a hundred Sheep: The Defendant pleaded a former Judgment in Treſpaſs brought againſt him; *quare cepit & abduxit* thoſe Sheep; and that the Plaintiff in that Action recovered two Pence Damages; and that both Actions were for the ſame thing.

The Plaintiff replied, That the two Pence Damages were recovered for the Chaſing, and not for the Value of the Cattle; and upon a Demurrer had Judgment; for the Smalneſs of the Damage implies it was for the Chaſing; and it ſhall be intended that he had his Cattle again, and that the Converſion was afterwards.

My Lord *Coke* in *Ferrer*'s Caſe tells us, That a Recovery by Verdict, Confeſſion, or upon Demurrer in a Perſonal Action, is a good Bar to an Action in the like Nature, and for the ſame Thing; but that muſt be underſtood where the ſame Evidence will maintain both the Actions.

Juſtice *Croke* reports the ſame Caſe to be ended by Arbitration; but that it was the Opinion of my Lord *Anderſon* and Juſtice *Glanvile*, That Trover and Treſpaſs were Actions of different Natures, and one may be brought where the other cannot be maintained; as upon a Demand and Denial Trover will lie, but not Treſpaſs *Vi & Armis*, becauſe the Taking was not tortious.

And therefore it may be well intended, That when the Plaintiff brought Treſpaſs, he was miſtaken in that Action, and being in the Wrong, was barred; but that will be no Bar where a right Action is brought; as if I deliver a Bond to another for Advice, who refuſing to deliver it, I bring an Action of Treſpaſs, and am barred either by Verdict or Demurrer, yet I may bring Detinue.

Treſpaſs and Detinue are not the ſame Actions, and therefore a Judgment in one ſhall be no Bar to the other; but where two Actions are brought for one Thing to be recovered; in ſuch Caſe a Recovery in one ſhall be a Bar to the other.

There is no ſubſtantial Difference between Treſpaſs and Trover; for the diſpoſing of the Goods in the one Caſe is the ſame with the Converſion in the other; the taking *Vi & Armis*, and likewiſe the Converſion are both tortious; and therefore either Action may be well brought.

But

But for the Reasons given by the Plaintiff's Counsel, he had Judgment by the Opinion of the Chief Justice, and the other two Judges, *Jones* and *Raymond*; of which Justice *Dolben* did very much doubt. 3 *Mod.* 1. *Put versus Rawstern Mil'.*

There was a Sentence in the Court of Admiralty concerning the taking of a Ship, and afterwards an Executrix brought an Action of Trover and Conversion for the same.

The Defendant after an Imparlance, pleads, That at the Time of the Conversion he was a Servant to King *Charles* II. and a Captain of a Man of War, called the *Phœnix*; and that he did seize the said Ship for the Governors of the *East-India* Company, she going in a trading Voyage to the *Indies*, contrary to the King's Prohibition, *&c.* And upon a Demurer these Exceptions were taken to this Plea.

1. The Defendant sets forth, That he was a Servant to the King; but hath not shewed his Commission to be a Captain of a Man of War.

2. That he seized the Ship going to the *Indies* contrary to the King's Prohibition, and hath not set forth the Prohibition itself.

It was argued by the Counsel *contra*. That it may be a Question, Whether this was the Conversion for which the Action is brought? For it was upon the Sea, and the Defendant might plead the Jurisdiction of this Court, the Matter being then under the Cognizance of the Admiralty. But as to the Substance of this Plea 'tis not material for the Defendant to set forth his Commission, or the King's Pro-

hibition; he hath ſhewed enough to entitle the Court of Admiralty to a Juriſdiction of this Cauſe; and therefore this Court cannot meddle with it, for he expreſly affirmeth that he was a Captain of a Man of War, and did ſeize this Ship, *&c.* which muſt be intended upon the Sea, ſo that tho' the Converſion might afterwards be upon Land, yet the Original Cauſe ariſing upon the Sea, ſhall and muſt be tried in the Admiralty; and it having already received a Determination there, ſhall not again be controverted in an Action of Trover.

The Caſe of Mr. *Hutchinſon* was cited to this Purpoſe, who killed Mr. *Colſon* in *Portugal*, and was acquitted there of the Murder; the Exemplification of which Acquittal he produced under the Great Seal of that Kingdom; being brought from *Newgate* by an *Habeas Corpus* to this Court, notwithſtanding the King was very willing to have him tried here for that Fact, the Conſideration whereof he referred to the Judges, who all agreed, That he being already acquitted by their Law, could not be tried again here. *Adjournatur.* 3 *Mod* 194. *Beak verſus Thyrwhit.*

When an Action of Trover and Converſion lies after a Recovery in *Treſpaſs.*

Upon Trover and Converſion of one Hundred Sheep, ſhewing, That the Plaintiff upon the twenty-fifth Day of *March*, *anno* 19 *Jac. Regis*, was poſſeſſed of thoſe Goods and loſt them; and that upon the laſt Day of *April* they came to the Defendant's Hands, who the ſame Day ſold and converted them to his proper Uſe: The Defendant for eleven of them pleaded Not Guilty, *Et quoad* the 89 *Reſiduum* he pleaded, That the Plaintiff at another Time, *viz.* upon the eighteenth Day of *September*, *anno* 19 *Jac. Regis*, proſecuted an Original

Original Writ out of the Chancery, returnable in this Court, against the Defendant, and one *Brian Smith*, *Quare ceperunt & abduxerunt* 100 *Oves*, and thereto they appeared; and the Plaintiff counted against them of the taking of an Hundred Sheep upon the fourteenth Day of *April*, *anno* 19 *Jac. Regis*, and thereto they pleaded Not Guilty for the eleven Sheep, and for the eighty-nine Residue they pleaded a Recovery in Debt, by the Defendant against *Edward Hatchliff*, of a Debt of sixty Pounds; and that the said *Edward Hatchliff* was then possessed of the said eighty-nine Sheep; and that by Vertue of a *Fieri Facias* those Goods were sold unto him, whereupon he took them into his Custody. The Plaintiff thereto replied, and took Issue, and found for him, and Damages assessed to two Pence: And thereupon the Plaintiff had Judgment of the said Two Pence Damages, and six Pounds for Costs; and averrs, That the said Taking and Driving, for which the Recovery in Trespass was had, and the Conversion of the said eighty-nine Sheep in the Action, be all one; and that the said Judgment is yet in Force. To this Plea the Plaintiff replies, That true it is, he brought such an Action, and recovered the two Pence for the taking and driving of the said eighty-nine Sheep, and six Pounds for Costs; but he further saith, That the said two Pence Damages was not assessed for the Value of the said Sheep and the Conversion of them; and that the said Defendant, at the Day and Year in the Bill, sold the said eighty-nine Sheep, and converted them to his own Use; the which Conversion is the same Conversion whereof he now complaineth, and traverseth, that

the ſaid taking and driving, in the ſaid Action whereupon the Judgment was given, is the ſame Treſpaſs; *quoad* the Converſion of thoſe Goods whereof the Plaintiff now declareth. And upon this Replication the Defendant demurred generally; and it was now argued at the Bar, by Serjeant *Crew* for the Defendant, and by Serjeant *Henden* for the Plaintiff; and after the ſaid Arguments at the Bar, it was reſolved by *Hutton*, *Harvey* and *Croke*, That this Replication is good; and that the Plaintiff ought to recover; for the Damages of two Pence given for eighty-nine Sheep being ſo ſmall, is in itſelf an Implication (and the Court ſhall ſo intend it) that it was given only for the taking and driving of them, and that the Plaintiff had them again; and not in Lieu of the Value of them; for if it ſhould be given for the Value of them, then the Plaintiff ſhould thereby loſe the Property in them, and have nothing for his Sheep but two Pence, and the Defendant ſhould have the Sheep: But the Law will rather intend (and ſo it may be averred) That thoſe Damages were given only for the taking and driving, and that the Plaintiff had them again, and afterwards loſt them, and that the Defendant found, and afterwards converted them, *&c.* And this Demurrer is a Confeſſion that he converted them after the ſaid taking and driving; for the Action of Treſpaſs is ſuppoſed to be upon the fourteenth Day of *April*, in the 19th Year of King *James*; and the Trover and Converſion in this Action is ſuppoſed to be upon the the thirtieth Day of *April*, the ſaid nineteenth Year of King *James*, which well ſtands with the former Action; for the

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Defendant may take and chaſe them one Day, and the Plaintiff recover Damages for the chaſing, and after loſe them, *&c.* And this firſt Action is brought for the firſt taking and chaſing, and the ſecond for the Converſion; ſo both may ſtand together, which is now confeſſed by the Demurrer, and that the Damages were given for the firſt taking and driving, and not for the Converſion; therefore they conceived the Plaintiff ſhould recover. But *Yelverton* held, Becauſe the Action of Treſpaſs is *cepit & abduxit*; therefore it includes that the Defendant had them, and ouſted the Plaintiff of the Poſſeſſion. And altho' the Damages be ſmall, it ſhall be intended to be given for the Sheep; and if ſo, then he cannot have an Action for converting them afterwards. 11 *Rich.* 2. Tit. *Treſpaſs*, 17. 40 *Ed.* 3. *fol.* 27. 46 *E.* 3. *f.* 18. 14 *H.* 7. *f.* 12. 44 *Ed.* 3. *fol.* 2. But Judgment was given for the Plaintiff. 3 *Cro.* 25. *Laicon verſus Barnard. S. C. Hutt.* 81.

In Trover and Converſion of an Ox of the Plaintiff's, *apud Aſhton*, the 10 *June*, 38 *Eliz.* The Plaintiff pleads, That at another Time, (*viz.*) *Termino Paſch.* 36 *Eliz.* in the Queen's Bench, the Plaintiff, and a fourth Perſon, who is now dead, brought Treſpaſs againſt *Simon Wignal*, and two others, of their Oxen taken 11 *Apr.* 35 *Eliz.* That the Defendant thereto appeared and juſtified as to an Heriot in Right of the now Defendant; upon which the Plaintiffs demurred, and adjudged againſt them, and pleaded all the Record in Certain; and avers, That the Plaintiff in the ſaid Action, and in this Action, are one and the ſame Perſons; that the Ox in the ſaid Action

Plea, a former Action in Treſpaſs brought againſt other Perſons for the ſelf ſame Thing.

and this is the ſame; and that the taking in this and in the other Action be all one; and that the Trover and Converſion ſuppoſed in this Action by this Defendant only, was committed by the other Defendants with him, and they have covinouſly and ſubtily omitted, and left them out, and not named them in this Action, and this Defendant was omitted out of the other Action ſubtilly; and they being one and the ſame Treſpaſs, Thing, and Matter, and not divers, and at one and the ſame inſtant of Time done. *Et hoc paratus eſt verificare unde ex quo, &c.* they were acquitted in the firſt Action; he demands Judgment, Whether the Plaintiffs to this Action of the ſame Matter and Cauſe ſhall be received to have and proſecute? And hereupon the Plaintiffs demurred. And *Walmſley* and *Kinſmil*, held the Bar to be good, Becauſe upon the firſt Judgment upon Demurrer, the Property of the Ox was admitted in that Defendant in whoſe Right the Juſtification was. Therefore the Plaintiff ſhall not have this Action without new Cauſe; and altho' he be a Stranger to the Record, whereby the Plaintiffs were barred, yet he is privy to the Treſpaſs, wherefore he well may plead it, and take Advantage thereof. And hereto the other Juſtices agreed, That if it be intended for one ſame Cauſe, that he well might take Advantage thereof. But *Anderſon* and *Glanvile* conceived here, That they be not barred; for a Bar in a wrong Action brought, is not any Bar where a right Action is brought; as where one delivers Goods to keep, and brings Treſpaſs againſt the Bailee for theſe Goods, and be barred by Verdict or Demurrer, that ſhall not be a Bar

Bar in one Action, when in another.

a Bar to him in bringing Detinue or Accompt, and here theſe Actions be of ſeveral Natures; and a Bar in the one cannot be a Bar in the other. *Walmſley* agreed, That where it is a Bar in an Action of Treſpaſs, upon Not Guilty pleaded, by Verdict, he may have this new Action; becauſe it appears not but that the Verdict was upon the Miſpriſal of the Nature of the Action. So it is, if ſuch a Caſe appears upon the Demurrer: But where a Title is pleaded in Bar to a Thing demanded, and by Reaſon thereof the Plaintiff is barred upon Demurrer, or Verdict, the Intereſt thereby is bound, and the Plaintiff ſhall be barred from bringing a new Action. *Et adjournatur*; and afterwards the Matter was ended by Arbitrament. 1 *Cro.* Sir *Humphrey Ferrers & al' v. Arden.* 6 *Co.* 7. *S. C.*

Plea Recovery, *v. J. S.* in Trover for the ſelf ſame Things.

Action *ſur* Trover of certain Plate; the Defendant pleads, That at another Time the Plaintiff had brought his Action for this ſame Plate againſt *J. S.* ſuppoſing the Converſion to have been in him. And in that Action had Judgment to recover 20 *l.* Damages, and had *J. S.* in Execution for the Damages; and avers, That it is for the ſame Goods, and for the ſame Trover and Converſion; and it was thereupon demurred. And after Argument by *Clerk* for the Plaintiff, That it was not any Plea; becauſe they having Judgment, and the Party's being in Execution, is not any Satisfaction unleſs the Money be paid; and then without Satisfaction it is not any Plea in Bar of this Action: As in Debt againſt two, by ſeveral *Præcipe's*, upon one Obligation, Judgment and Execution againſt one is no Plea for the other without Satisfaction. And Execution

tion of the Body is not any Satisfaction; as 33 *H.* 6. 47. 4 *H.* 7. 29 *H.* 8. Title *Executors* 132. 14 *H.* 4. But all the Court held the Plea to be good; for the Cauſe of Action being againſt divers, for which Damages incertain are recoverable; and he having Judgment againſt the one for Damages certain, that which was incertain before, is reduced *in rem Judicatam*, and to Certainty, which takes away the Action againſt the others. And therefore *Popham* ſaid, If one hath Judgment to recover in Treſpaſs againſt one, and Damages certain, altho' he be not ſatisfied, yet he ſhall not have a new Action of Treſpaſs. By the ſame Reaſon *econtra*; If one hath Cauſe of Action againſt two, and obtain Judgment againſt the one, he ſhall not have Remedy againſt the other; and the alledging, That he hath the one in Execution for this Cauſe, is not an Anſwer to the Purpoſe; and the Difference betwixt this Caſe, and the Caſe of Debt upon an Obligation againſt two, is, becauſe there every of them is chargeable and liable to the intire Debt; and therefore the Recovery againſt the one, is no Bar againſt the other until Satisfaction. And *Fenner* ſaid, That in Caſe of Treſpaſs, after the Judgment given, the Property of the Goods is changed, ſo as he may not ſeize them again: Wherefore by all the Court, *nullo Contradicente*, nor any of the Defendant's Counſel being there, it was adjudged for the Defendant. 2 *Cro.* 73. *Brown v. Wooton.*

How to reply to the Statute of Limitations.

In an Action of Trover and Converſion; the Defendant pleaded the Statute of Limitation of Actions in Bar. The Plaintiff replied, That he took out a *Latitat* ſuch a Term againſt the Defendant, for this Cauſe now depending, which

which was in the Time limited by the Statute. To this Replication the Defendant demurred; and for Cause shewed, That it was incertain, and so no Issue can be joined upon it; for it only says, That he took out a *Latitat* such a Term, and doth not shew what Day of the Term he took it out; and so we cannot take Issue upon it; and the usual Form is to shew the Day. *Latch* maintained the Replication; and said it was good in Matter of Substance, and the *Latitat* shall be intended to issue forth the first Day of the Term; for the whole Term is but one Day in Construction of the Law; and the Defendant may take a certain Issue as it is pleaded. *Rolle*, Chief Justice, answered, You ought to have shewed the *Teste* of the *Latitat*; for the Time is material in this Case, *viz.* to know whether it were sued forth within the Time expressed in the Limitation of Actions, or without, namely, within six Years, or no; and you might have made it certain by your pleading Specially. *Jerman* differed in Opinion; and thereupon the Court took time to advise. *Style* 178. *Coles* against *Sibsye*.

De injuria sua propria, when a good Replication.

Action *sur* Trover of divers Trees, *apud D.* in the County of *Surrey*; the Defendant pleads, That Queen *Mary* was seised in Fee of the Manor of *D.* in the County of *Sussex*, where those Trees were growing, and granted it to the Defendant in Tail, whereby he was seised thereof; and that *J. S.* cut the said Trees and granted them to the Plaintiff, who lost them, and the Defendant found and converted them, *&c.* The Plaintiff replies, *De injuria sua propria, &c.* And thereupon Issue was joined. *Coke* moved, That the Replication was ill; for

De injuria ſua propria is not any Plea, where the Defendant makes Juſtification by claiming an Intereſt in the Freehold to himſelf; as 16 *Ed.* 4. 4. 44 *Ed.* 3. 18. and 14 *H.* 4. 32. is upon the ſame Reaſon. But where one claims not any Intereſt, but juſtifies by Command or Authority derived from another, it is otherwiſe: And of that Opinion was the whole Court. Wherefore a Replevin was awarded. 1 *Cro.* 539. Archbiſhop of *Canterbury v. Kemp.*

Barr' al' Trover.

TRover de 2 bobus, barr' quod boves ven' in manerium' def. in quo ipſe per preſcript' habuit extrahur', unus bos moriebatur de infirmitate, & def. proclamavit alterum 2 diebus mercator', &c. Replic' quod unus bos obiit per nimium laborem, & trav. quod obiit de infirmitate, & quod def. convertit al' bovem & trav' quod proclam' 2 diebus mercatoriis. Co. Entr. 40.

Quod def. ballivus manerii in quo dom' habuit bona waiviat. in Com' Midd' cepit averia ibidem waiviata & trav' converſion' in Com' Warr' Demurr' inde. 3 Br. 485.

Quod emebat annulum in aperta Shopa in London. Ub. 234.

Similis Barr' Replic' per maintenance de barr', & trav' ſale tali die, Demurrer inde. Her. 252.

De cipho argenteo, quod fuit impignorat' ei per Quer. pro 40 s. cum intereſſe. Her. 177.

Similis barr' de 3 ciphis Replic' per manitenance de narr', & travers' impignorat. Her. 209.

Trover pro admin' barr' quod adminiſtratio fuit prius commiſſa def. qui cepit bona & diſpoſuit pro ſolue' debitor. & funeral' defunct. Replic' quod

Quer. citari fec' def. in cur' Christianitat. pro admulac' literarum adm' quæ fuer. revocat' & commiss. quer. & def. vendidit bona pendent' lite & travers quod disposuit denar' circa solue' debitorum & Funeral' expens'. Demurr' inde. Co. Entr. 38

Trover per exec' de catenis aureis, &c. al' part. non Cul' al' residuum quod def. uxor' testatoris habuit eadem in vita viri pro apparat', &c. Et aver' quod Quer. ultra eadem habuit bona sufficien' ad solvend' debita, &c. Replic' per maintenance de narr. Et travers quod bona testatoris ultra catenas ad solven' debita. Rast. 81. Her. 244.

Quod distrixit bona in messu' pro redditu insolut. super dimission' inde Quer' qui requisivit bona district' ei lib'ari, quod def. recusavit nisi solveret reddit. Et travers quod est cul' alit.. 3 Br. 483.

De ligno. Quod Rex seisit' de boscis unde, &c. concessit def. in tallio, qui succ' arbores. Et done color. Replic. quod Quer' fuit seisit' de aliis boscis ubi arbores crescebant. Et trav's quod crescebant in boscis def. Co. Entr. 41.

Trover de bonis conversis & vendit', barr' quod non vendidit bona, &c. Dyer. 121. 1 And. 20.

De accipitre, barr' quod invenit eum in columb' & deliberavit Vic. nesciens quod pertinebat quer. Her. 104.

De equo; barr' quod quer. posuit equum def. hospitatori pabuland. & non solvit pro pabulo, per quod def. per cons. regni post pabulum ultra valorem equi insolut. eum cepit, & convertit. Demurr. inde. Her. 162.

Non

Non Cul'. 1 Bro. 358. Bro. met. 20. Win. Entr. 33.

Non Cul' to Part; to the Reſidue he pleads other Action in Barr and Recovery thereon. *Tre. Tro.* 163.

Stat. Limitations pleaded at Large. *Tre. Tro.* 159.

Quod def. ballivus manerii in quo Dominus habuit bona waiviat' in Com. Midd. & cepit averia ibidem waiviat. Et travers quod eſt Cul' in London. Demurr. Special. Vid. 8.

Quod Quer' licenciavit un' eſtranger impignorare bona pro ſecuritat' ſoluc. denar. ſuper inde mutuat. Replic. quod non licenciavit & iſſue. Tho. 61. *Simile* 3 Inſt. Cl. 304.

Quod cepit equam ut extrahur' & fecit proclam'. Et poſuit eam ad depaſturand. Et quia quer. noluit ſolvere def. pro paſtura detinebat equam quouſq; evaſit. 3 Inſt. Cl. 295. *Repl' quer. obtulit ſolvere* 13 s. 4 d. *pro emendis & def. recuſavit accipere. Rejo. proteſtando non fuer. ſufficien. emend. pro placito non obtulit.* 298. *Simile* Bro. R. 94.

Al' Trover & Converſion' d'un' Chival, def. juſtifi come Bailiff Præpoſit. & Scholar' Collegii Regalis Cantabr. Quer' Demurr. Specialment. Br. R. 102.

Barr' quod def. emebat in aperta Shopa in London. Tho. 62. Tre. Tro. 156, 161. Vid. poſt.

Simile cum avermentis. 1 Bro. 357. 5 Co. 83.

Simile de aureo annulo, cum traverſia, quod non ſcivit annulu' fore annulu' def. Ra. Entr. 30. *Simile* 3 Inſt. Cl. 294.

Si-

Similis Barr' cum avermentis Repl' per maintenance de narr'. Et travers ſale tempore diei. Demurr. inde Special'. Ra. Entr. 24.

Similis Barr' de ſevo empt. in Weſtm. Similis Replic' & travers, iſſue inde. Ra Entr. 449.

Similis de 4 ulnis diapis empt. apud K. Replic' de injur' propr' & travers vendition. in aperto mercato iſſue inde. Ra. Entr. 449, 450. 1 Bro. 158. That the Defendant bought the Goods in open Market. 2 *Mo. Intr.* 151. *Simile* 3 Inſt. Cl. 293.

Al' narr' de 3 Cyphis. Barr. quod fuer' impignorat' def. per quer. pro 22 l. cum intereſſe. Replic' per maintenance de narr'. Et travers impignoration' Ra. Entr. 43. *Rejoind. & Iſſue ſur le Traverſe.*

Simile de Nave & Bonis. Barr. quod def. ut Capitaneus navis regalis per mandat. Regis cepit navem & bona ut priſam negotian' in partibus tranſmarinis contra prohibitionem Regiam, Demurr' inde. Br. R. 99.

Trover de averiis. Barr' quod per conſ. Civit. London averia viva empt. vel. vendit. per forinſecum infra mercatu' de Smithf. ante horam nonam meridiei foriſfact. fuer' majori, &c. Quod Quer' vendidit 2 Juvencos quos def. ſeiſivit. Et travers quod ſunt cul' de converſion' apud. W. Tho. 380.

Al' Narr' de bonis, Barr' quod Quer' dimiſit def. Cottag' cum bonis, & agreat' fuit int. partes quod def. uteretur bona pro termino & in fine ead. deliberaret vel ſolveret quer. rationabile pretiu' adjudicand. per W. qui adjudicavit ea ad 5 s. quos def. obtulit. Demurr. inde. Wi. Entr. 31.

Al'

Al' narr' de ſpadone. Barr. quod quer' dedit authoritat. T. vendere Spadonem, qui agreavit cum def. quod ipſe probaret eum, & ſi non fuit ſanus vel' diſpliceret def. tunc redeliberaret T. def. invenit Spadonem inſanum per quod eum redeliberaret. T. cum averment. quod ſpado fuit in tam bono ſtatu, &c. Replic' per maintenance de narr' Et travers agreament. 1 Bro. 356. *Simile* 3 Inſtr. Cl. 298.

De 90 ovibus amiſſis. Barr. per Judicium pro Quer. ſuper veredicto in trangr' in ead. Cur' pro eadem cauſa & dampna aſſeſ. ad 2 d. *Replic. quod duo denar. non fuer. aſſeſ. pro valore ſeu \converſion' ovium ſed pro caption' & fugation' ovium. Et travers caption. & fugation. in al. action. fore ead' quoad converſion. ovium Demurr' Special'.* Win. Entr. 99. 1 Cro. Lacon's *Caſe.*
Simile Placitum. Win. Entr. 62.

Barr. al. Trover quod emebat bona in aperta Shopa in London. Replic. per maintenance narr. & quod def. deliberavit bona, cuidam R. qui per fraudem inter ipſum & def. vendidit bona def. ad intentionem defraudare quer'. Rejo. per maintenance de Barr. Et travers le fraud & Iſſue inde. Win. Entr. 109. *Simile* 3 Inſt. Cl. 289.

Barr. al. Trover de Cimba Quod Admirallus Angliæ per literas Paten. habuit omnia Wreeca ſuper littora Maris vel rivorum infra fluxum & refluxum Maris J. Officiar. Cur' Admiralitat. cepit Cimbam fluctuan. in Rivo Thameſis & vendidit Quer'. Replic. quod def. infra annum & diem poſt ſeiſur. cimbam clamabat, iſſue ſur le claime. Ra. Entr. 445.

Barr.

Barr. quod def. affirmavit querelam in debito in Cur' Westm. versus quer. sum. & attach. inde agard. ballivo Cur', qui bona attachiavit, & quer. ad prox Cur' defalt. faciend' bona forisfact. fuer. Domino per quod ballivus ea seisivit & deliberavit def. salvo custodiend. quousque, &c. Et travers quod Quer. possess. fuit de bonis die & anno narr. spec'. Ra. Entr. 447.

Al narr. per Exec' del Exec' Barr. quod def. seisitus de mes. dimisit testatori pro anno reddendo reddit. & pro redditus insoluc. nomine districtionis cepit bona, Et travers le conversion. in narr'. Replic. per maintenance de narr. & issue. Ra. Entr. 450, 451.

Quod Quer' cognovit Statut. Stapul. def. pro 200. *qui superinde prosecut. breve de extendi fac. quod deliberavit Vic. qui virtute cujus seisivit bona quer. & ea liberavit def. in parte satisfact. debiti.* Ra. Entr. 451.

Trover by a surviving Merchant; Defendant pleads they were joint Merchants, and so there ought to be no Survivorship; and that one of the Deceased made a Will, and left an Executor, who proved it, and is living, and so of the other. To which the Plaintiff demurred. *Lev. Entr.* 20.

Defendant pleads, That the Plaintiff sold the Goods to him at *London. Bro. Vade mec.* 120.

That the Plaintiff licensed a Stranger to pawn the Goods for Security of Money lent. 2 *Mo. intr.* 149. *Tre. Tro.* 158.

Plea, That the Plaintiff delivered the Horse to *B.* to sell for him; and that he sold him to the Defendant upon a Price if he was pleas'd with him; and gave him Leave to try him by riding 3 Miles. *Tre. Tro.* 177.

To Trover for an Anvil; Plea, That the Defendant, as Bailiff of the Court-Baron of *E.* and by Vertue of a *Levari*, did levy and take the Plaintiff's Anvil, had it appraiſed, and ſold it for 26 *s.* and gave the Money to *O. B.* who had recovered the ſame againſt the Plaintiff in the ſaid Court in an Action on the Caſe. *Tre. Trn.* 181.

Sur Trover d'un Chival Def. juſtify le Converſion per le Cuſtom d'Angleterre ut Communis Hoſpitator pro pabulo. 3 Inſt. Cl. 300. *Simile* Ra. Entr. 26, 27.

Al' Trover & Converſion del biens le Plaint. & Def. un Waterman plead que les beins fuer' ſubmers & perdus per Tempeſtat', &c. Id. 300. *Simile* Br. R. 101.

CHAP. VI.

Of the Evidence, Verdict and Judgment, in Actions of Trover and Converſion.

Sentence of the Spiritual Court in a Cauſe within their Juriſdiction is concluſive Evidence in the Point tried, otherwiſe of a collateral Matter.

IN Trover, upon Evidence at a Trial before *Holt*, Chief Juſtice, at the Sittings in *Middleſex*, the Caſe was, The Plaintiff proved the Goods to be in his Poſſeſſion, and to be taken away by the Defendant: The Defendant ſhewed, That theſe were the Goods of *Jane Blackham*, in her Life-time; and that the Defendant had taken out Letters of Adminiſtration to her, and ſo was intitled to the Goods. Upon this the Plaintiff proved, That ſome few Days before her Death, ſhe was actually mar-

married to him: And in Anſwer to that it was inſiſted, That the Spiritual Court had determined the Right to be in the Defendant; for they could not have granted Adminiſtration to the Defendant, but upon ſuppoſing there was no ſuch Marriage; and that this Sentence being of a Matter within their Juriſdiction, was concluſive, and could not be gainſaid in Evidence. *Et per Holt*, Chief Juſtice, A Matter which has been directly determined by their Sentence, cannot be again tried. Their Sentence is concluſive in ſuch Caſes, and no Evidence ſhall be admitted to prove the contrary; but that is to be intended only in the Point directly tried: Otherwiſe it is if a collateral Matter be collected or inferred from their Sentence, as in this Caſe; becauſe the Adminiſtration is granted to the Defendant, therefore they infer that the Plaintiff was not the Inteſtate's Husband, as he could not have been taken to be, if the Point there tried had been Married or Unmarried, and their Sentence had been, Not married. 1 *Salk.* 290. *Blackham's* Caſe.

Evidence of a Sale in Market-Overt.

In Trover and Converſion, Iſſue was join'd, That the Horſe in Queſtion was bought at *Dale* in the County of *York*, in open Market there; but the Evidence was, That it was bought at *S.* in *Lancaſhire*; and it was holden, That this did not prove the Iſſue; and that as this is pleaded, the Place is material; whereas upon a General Iſſue it had not been ſo. *Nota.* *Cl.* 131. *Anonymus.*

Son took the Father's Money and gave it to *H.* and the Son's Evidence admitted in Trover against *H.*

In Trover for Money, the Case was upon Evidence, That the Plaintiff's Son had general Authority from his Father, to receive and pay out his Father's Money. The Son took a Bill for Money due to his Father, and received it without a particular Authority for that Purpose, and this Receipt was with an Intent to imbezil and spend it: But he gave a Receipt as for Money had to his Father's Use; and this Money was given to the Defendant. The Questions were, 1st, If the Son could be a Witness in this Case to prove the Delivery? And 2ndly, Whether the Father could maintain an Action of Trover? *Holt*, Chief Justice, was of Opinion, That the Son might be admitted as a good Witness, his Testimony being corroborated by other Circumstances; and that the Action was maintainable for the Father; for that the general Authority that the Son had to take his Father's Money, made the Receipt of the Money to be to his Father's Use, and a good Discharge of the Debt, so as that the Father could not avoid the Payment, and charge the Person that paid the Money with an Action; and then, if the Payment was a good Discharge, it is Reason it should be his Money; and the Possession of the Son is the Possession of the Father, the Son being to this Purpose as his Father's Servant; and according to this Opinion the Plaintiff had a Verdict, but he said he was willing to have a Case made of it; but the Defendant acquiesced in his Opinion. 1 *Salk.* 209.

Whether the Delivery of Goods in Pawn may be given in Evidence?

In an Action on the Case for Trover and Conversion of Goods; the Defendant pleads the Plaintiff pledged them to him for ten Pounds;

Pounds; Whether it ought to be pleaded or given in Evidence? *Dubit. Bro.* Action on the Caſe. *Pl.* 113.

In an Action on the Caſe for a Trover and Converſion brought by *J. S.* a Citizen of *Colcheſter*, againſt the Farmers of Toll of the City of *London* for taking of Goods; the Defendant pleaded Not Guilty. Upon a Trial at Bar, *Jones* and *Croke* being only in Court, the Defendant confeſſed the taking of the Goods for Non-payment of Toll, which the Citizens of *London* claimed by Cuſtom, and the Citizens of *Colcheſter* claimed to be exempt by Charter of King *Richard*, and the Citizens of *London* proved by ſeveral Records and Entries in their Books, that the Citizens of *Colcheſter* paid Toll. And on the Evidence, the Counſel for the Plaintiff objected, That this was no good Evidence on Not Guilty, but ought to have been pleaded Specially; to which Opinion *Croke* inclined. *Sed Jones econtra*; for it is not like a general Action in Treſpaſs, in that he muſt plead Specially the Cuſtom for Toll; but in an Action on the Caſe for Trover and Converſion, every Thing that proves the Converſion lawful may be given in Evidence on the General Iſſue; but the Jury was permitted to bring in a Special Verdict if they pleaſed: Nevertheleſs they found a general Verdict for the Defendant; and Judgment was given accordingly. *W. Jones* 340. City of *Colcheſter verſus* City of *London*. *Note*, It appears by 1 *Roll Rep.* 44. in the Caſe of *Hill* and *Hawkes*, That the Cuſtom to take Toll may be pleaded Specially.

Cuſtom of *London* given in Evidence.

Declaration of a Trover in *Middleſex*, and proof of one in *Ireland*, good.

In Trover, upon Not Guilty pleaded it appeared in Evidence, That the Defendant was Tenant by the Curteſy of Lands in *Ireland*, and had cut down and ſold the Trees of the Eſtate; and that the Reverſion belonged to the Plaintiff, and two others in Coparcenary: Upon a Caſe made for the Opinion of the Court, it was reſolved. 1ſt, That in local Actions, as in Treſpaſs *quare clauſum fregit*, the Plaintiff cannot prove a Treſpaſs but where it lay, nor lay it in any other Place but where it is; but it is otherwiſe in Actions Tranſitory, as Trover: *Ergo*, here he may lay the Converſion here, and prove it in *Ireland*. *Vide Style* 331. 2dly, One Jointenant, or Tenant in Common, or Parcener, cannot bring Trover againſt another; if he does, it is good Evidence upon Not Guilty: But if one Jointenant brings Trover againſt a Stranger; in that Caſe the Defendant may plead it in Abatement, but cannot take Advantage of it in Evidence. 2 *Lev.* 113. *Cro. El.* 554. 1 *Salk.* 290. *Brown ver. Hedges.*

Detainer after Requeſt to deliver, Evidence of a Converſion.

Harris ſaid, That it was the common Experience, that the Detainer of Goods from an Owner after Requeſt, is allowed for a ſufficient Evidence to maintain a Converſion: Whereunto I anſwered, That tho' legally it were not a Converſion, yet in that Caſe it was reaſonable to allow it for an Evidence to prove a Converſion; becauſe, if you have Goods of mine lawfully, by Finding or Bailment, yet when I require them of you, you can no longer lawfully hold them; and therefore when you ſtill detain them from me, it argues you claim them as your own, and ſo uſe them. *Hob.* 187. *Agar v. Liſte.* S. C. not S. P. 1 *Brow.*

1 *Brow.* 5. *S. C. Hutt.* 10. But that Book ſays, Requeſt and Refuſal to deliver is good Evidence to prove a Converſion; but if it be found Specially, it cannot be adjudged a Converſion.

If the Goods were not the Plaintiff's, the Defendant ſhall not plead it; but ſhall plead Not Guilty, and give it in Evidence. *Bro. Action on the Caſe.* Pl. 109.

In an Action upon the Caſe upon a Trover and Converſion of 200 *l.* delivered by the Plaintiff to the Defendant; and upon Not Guilty pleaded, the Queſtion was, If Denial by the Defendant to pay it upon Requeſt, would bear an Action; and the Caſe of *Iſaac* was argued, who brought an Action of Trover, *&c.* for 200 *l.* in a Bag; and by Verdict it was found that Demand was made thereof, and a Denial to pay; and by *Doderidge*, it was a Converſion. Denial, Whether Evidence of a Converſion.

Croke accorded; but *Haughton* doubted the Caſe. And *Man*, Prothonotary, ſaid, That he remembred a Precedent in the Caſe, where it was reſolved, That in ſuch Caſe, a Denial of a Horſe was a Converſion.

Haughton, I remember an Action of Trover was brought for a Trunk, and it was ruled there, That if one hath Timber in my Land, and he demands Liberty to carry it off my Land, and I deny it; this is not a ſufficient Converſion.

Doderidge, There is great Difference in Caſes; for a Horſe or Money cannot be known, if they be uſed; but Timber may. *Et adjournatur. Owen* 151. *Drury verſus Waller.*

What good Evidence of a Conversion.

Trover for 14 Lemon-Trees, and the Statute of Limitations pleaded. On Evidence at *Nisi Prius*, *coram Holt*, Chief Justice, it appeared, The Plaintiff obtained Leave from my Lord *Brudenell* above six Years before to have the Trees stand in his Garden at *Twittenham*; and that his Lordship's Gardener might take Care of them. After my Lord sold his Garden, with all his Trees therein, to my Lord *Portland*; who afterwards sold the Garden, and whatever he had from my Lord *Brudenell*, to the Defendant; and a Demand and Refusal within six Years proved upon the Defendant.

Here it was objected, 1. That the Gardener, who received the Trees first from the Plaintiff, and continued Gardener all along, and looked after and reared the Trees, could not be a Witness; for that he, in case he proved a Title in the Plaintiff, could hereby intitle himself to an Action for his Labour and Skill employed in rearing up the Trees; whereas if it went for the Defendant, he was to have nothing.

But this was over-ruled by *Holt*, Chief Justice, Because if the Gardener took Care of them as my Lord *Brudenell*'s Servant, he was to have nothing for his Pains from the Defendant.

2. If my Lord only gave the Gardener Leave to do it for the Plaintiff, the Gardener then was so far the Plaintiff's Servant; and it was never doubted, but a Servant was a good Witness for his Master.

He also held, That these Trees being in Boxes, and separate from the Freehold, could not pass by the Grant of the Garden, nor by the

the Words (all his Trees therein); for they were not his Trees; that is, my Lord *Brudnell*'s. Nay, It would be hard to comprehend them by Conſtruction within the Grant, if the Words had been (all the Trees in the Garden), without there were a Schedule of the Trees intended to paſs, and the Plaintiff's Trees mentioned therein; but he agreed, if they had been conveyed by my Lord *Brudenell*'s Grant, that had been a Converſion; and being above ſix Years, the Iſſue would be againſt the Plaintiff.

And beſides that, The Grant of the Garden was a Determination of the Licenſe given to the Plaintiff; and that the Grantee might diſtrain the Trees Damage-feaſant, but he having not done ſo, but ſuffered them to continue, was ſo far from a Converſion, that it was Evidence of a Licence by him. And he ſaid, That by a Grant of all a Man's Trees, Apple-trees would not paſs. And the Plaintiff had a Verdict. *Mod.* C. 170. *Oliviere ver. Vernon.*

Denial after Requeſt Evidence of a Converſion.

In an Action upon the Caſe on Trover, 'twas found by a Special Verdict, That one *Peper* was poſſeſſed of thoſe Goods, and the Defendant found them; and *Peper* made the Plaintiff his Executor; and that the Defendant knowing them to appertain to the Plaintiff, denied to deliver them unto him upon his Requeſt. And whether that were a Converſion without any other Act done? was the Queſtion; and all the Juſtices, *Popham* abſent, held, That it was a Converſion by the ſole Denial. But being afterwards moved again, *Popham* held it to be no Converſion: But it was cited at the Bar, That 23 *Eliz.* in this Court,

Court, it was ruled to the contrary. *Ed adjournatur.* 1 *Cro.* 495. *Eaſon ver. Newman, S. C. Goldſ.* 152. *S. C. Moo.* 466. and there 'tis ſaid to be adjudged a Converſion in *Popham*'s Abſence, and cited to be ſo adjudged. *Moore* 841. *Iſaac ver. Clark. Brown.* 17. *Anonymus.* Adjudged a Converſion.

Converſion *quid*, and what Evidence of one.

In Trover at *Niſi Prius, coram Holt*, Chief Juſtice; upon Evidence the Caſe was this: A Carpenter ſent his Servant to work for Hire to the Queen's Yard; and having been there ſome Time, when he would go no more, the Surveyor of the Yard would not let him have his Tools, pretending a Uſage to detain Tools to enforce Workmen to continue till the Queen's Work was done; and a Demand and Refuſal being proved at one Time, and a Tender and Refuſal after: *Holt*, Chief Juſtice, The very Denial of Goods to him that hath a Right to demand them, is an actual Converſion, and not only Evidence of it, as has been holden; for what is a Converſion but an aſſuming upon one's ſelf the Property and Right of diſpoſing another's Goods; and he that takes upon himſelf to detain another Man's Goods from him without Cauſe, takes upon himſelf the Right of diſpoſing of them; ſo the taking and carrying away another Man's Goods, is a Converſion: So if one comes into my Cloſe, and takes my Horſe and rides him, there it is a Converſion; and here, if the Plaintiff had received them upon the Tender, notwithſtanding the Action would have lain upon the former Converſion; and the having the Goods after would go only in Mitigation of Damages; and he made no Account of the pretended Uſage, but compared

pared it to the Doctrine among the Army, That if a Man came into the Service, and brought his own Horſe, that the Property thereof was immediatly altered and veſted in the Queen, which he had already condemned: And here one of the Particulars in the Declaration being ill laid, the Defendant was found not Guilty as to that, and Guilty as to the reſt. *Mod. Ca.* 212. *Baldwin ver. Cole.*

Evidence againſt a Miller who ground Oats.

An Action of Trover and Converſion was brought for Oats, *&c.* and the Cauſe upon proof was, That certain Treſpaſſers had taken theſe Oats from the Plaintiff, and brought them to the Mill to make into Oat-meal, and the Plaintiff came to the Miller before any Thing done, and demanded the Oats as his, and forbid him to proceed to make it into Oat-meal; but the Miller did proceed for all that, and made it into Oat-meal; and the Judge held it to be a Converſion in the Miller, and directed the Jury accordingly, altho' it was urged by the Counſel of the Defendant, That a Miller was a Publick Officer, and did but his Duty in this Caſe: And in this Caſe it was holden further, That if *A.* takes Goods from me, and theſe afterwards come to the Hands of *B.* by buying or otherwiſe, and he converteth them to his Uſe, *B.* ſhall not be charged to me without a new Demand made of them unto him, and a Detention afterwards. *Clayt.* 57. *Holdſworth's* Caſe. *Mo.* 460. 1 *Cro.* 495. *Gols.* 152.

Uſer and Demand, when Evidence of a Converſion.

Upon Motion for a new Trial, the Caſe appeared to be this, An Executor ſeveral Years before, had left ſome Houſhold-ſtuff in the Houſe by the Conſent of the Heir, who uſed them after, and within ſix Years of the

the Action brought, the Executor demands the Goods, and the Heir refuſed to let him have them; whereupon Trover was brought, and the Statute of Limitations pleaded. And *per Cur.* The Uſer before the Demand was no Converſion or Evidence of it; for it was with the Conſent of the Executor till then. And the Demand being within ſix Years, the Refuſal which enſued it, and is the only Evidence of a Converſion in the Caſe, was within the ſix Years; and if a Trover be before ſix Years, and a Converſion after, the Statute cannot be pleaded. *Fareſt.* 99. *Wortley Mountague ver.* Lord *Sandwich.*

Statute of Limitations, when it may be pleaded in Trover.

The taking by the Commiſſioners of Sewers may be given in Evidence.

In Trover and Converſion, upon Not Guilty the Evidence was, That the Goods were taken and ſold by Virtue of a Commiſſion of Sewers; and it was ruled, That this Matter might be well given in Evidence upon Not Guilty pleaded, as detaining of Beaſts in a Market for Toll. *Alleyn* 62. *Combs verſus Cheney.*

Adminiſtrator may bring Trover for Goods ſold before the Maſt, the Cuſtom to ſell there being void.

A Seaman dies in the Voyage, the Captain, according to the Uſage among them upon ſuch Occaſions, takes all his Goods and ſells them at the Maſt, and makes an Inventory of them, and of the Rates he ſold them at, and delivered it to the Adminiſtratrix at his Return, who brings Trover for the Things juſt as they were mentioned in the Inventory, and recovered juſt the Value for which they were ſold, in Damages. One *Item* in the Declaration was, That the Inteſtate had been poſſeſſed of *duodecim dimid. Thecis de* (*Spirits*) with a Daſh as here, (*Anglice*, twelve Half-Caſes of Spirits) and alſo

fifty Gallons *Aquæ callidæ* (*Anglice* fifty Gallons of Hot-Waters.) At the Trial of this Cauſe before *Holt* at *Guild-Hall*, He held, That this being Trover upon the Poſſeſſion of the Inteſtate, and Not Guilty pleaded, that the Defendant cannot give in Evidence a Will made, and Executors appointed, but that ought to have been pleaded in Abatement. But if Trover had been on the Poſſeſſion of the Adminiſtrator, there, upon not Guilty pleaded, he might take Advantage of that Matter in Evidence. And if an Executor bring Trover upon the Poſſeſſion of his Teſtator, upon not Guilty, he ſhall not be put to prove himſelf Executor; *ſecus*, if he had brought it upon his own Poſſeſſion. And he farther held this Uſage of ſelling Goods of dead Seamen, at the Maſt, to be void. After Verdict it was moved in Arreſt of Judgment, by *Branthwaite*; 1. That it is incertain what is meant by Caſes. 2. That the Quantity ought to appear. 3. Spirits is of an incertain Senſe. 4. It ought to have been put into *Latin*, ſince it hath a *Latin* Word, or with a framed, and an *Anglice*; for if Words be ſo incertainly laid, that it is not known what is meant by them, it is ill; but if they be inſenſible Words, no Damages ſhall be intended to be given for them; and this was agreed to *per Cur'*, and they all held, That Trover will lie for a Caſe or Tub, becauſe it is an individual Thing; but if one bring Trover for a Tub of Water or Beer, without ſhewing how much it contains, they inclined that it was incertain, tho' it ſhall be underſtood to be for the Tub and the Beer: But it was agreed, It would lie for a Trunk of Linen, for a Library of Books, &c.

What Evidence may be given in Trover on the Poſſeſſion of the Inteſtate.

What on the Poſſeſſion of the Adminiſtrator.

&c. Mountague contra. Style 370. Trover by a Carrier, and a Trunk of Linen, and other Matters, good after Verdict. Action for burning the Defendant's Barn; *per quod*, he hath loſt ſeveral Goods, *& quædam Ornamenta pro equis*, good after Verdict. 1 *Keb.* 825. 1 *Ven.* 17. The Rule before put, if Words be inſenſible, Damages are not given for them; and if they have any certain Senſe, then it will be well; and he ſaid, a Caſe of Brandy or Spirits, was as well known among Seamen, as a Hundred of Fruit or a Bottle of Wine among others. *Vide* 2 *Ro. Rep.* 54. for Goods to the Value of 300 *l.* 1 *Sid.* 98. *Trover pro duobus Plancis Granariis* (*Anglice* Planks of a Granary) good becauſe confined to a certain Uſe and Place. *Style*, 338. for a Library of Books, without ſaying how many, or what Books. Good for a Piece of Brandy. 1 *Lev.* 203. *pro quadam Parcell. fili.* good. 2 *Saund.* 74. *pro decem paribus Tegulorum & velorum*, (*Anglice* Curtains and Vallens.) 1 *Lev.* 301. *De tribus Struib. Feni* (*Anglice* three Cocks of Hay.) 1 *Keb.* 237. *De duoden. fili.* (*Anglice* a Dozen of Thread.) *De uno Meſſuagio*, (*Anglice* the Sign of the Croſs-Keys.) *Style*, 419. *Cro. Jac. Wood v. Smith. De uno Plumbo, &c.* for a Sack of Corn.

Holt, One may have Trover for a Piece, tho' ſome be larger than other; and a Library of Books are eaſily aſcertained by the Place they were in, and asking what they were worth in the whole; and he put the Caſe of Trover, of ſo many *Ralis & Palis*, (*Anglice* Rails and Pales.) And tho' there the Word Gallon was ſaid to have a certain *Latin* Name, that is *Congius*, yet *Holt* ſaid, Our Gallons are

are not the ſame with that of the *Romans*: And the Caſe being moved at another Day, upon the *Spirits*, which was ſaid was *Engliſh*; whereas by the Statute of *H.* 6. all Pleadings are to be in *Latin*, the Court held, That a Caſe of Spirits was certain enough; and that Spirits with a Daſh might be well taken for *Spiritibus*; and there is the Word *Galo Galonis*, or *Galona Galonæ*, to be met with in *Spelman* for an *Engliſh* Meaſure, containing eight Pints, called a Gallon: And *per totam Cur'*. Plaintiff had Judgment. *Fareſt.* 141. *Blainfield verſus March.*

In Trover brought by an Executor, the Defendant pleaded, That the Teſtator died Inteſtate, and that Adminiſtration was committed to *A.* who ſold the Goods to the Defendant, to which the Plaintiff demurred, as amounting but to the General Iſſue; and ſo was the Opinion of the Court. 1 *Keb.* 318. *Farling verſus Dealoon.*

What a Converſion what not, and of Evidence of one.

Action *ſur* Trover of five Kine, upon Not Guilty pleaded, a Special Verdict was found, That one *Blegrave* was poſſeſſed of thoſe Kine, and put them to Paſturage with the Defendant, and agreed to pay him twelve Pence for every Cow weekly as long as they remained with him at Paſture; and that afterwards *Blegrave* ſold them to the Plaintiff, and he required them of the Defendant, who refuſed to deliver them to the Plaintiff, unleſs he would pay for the Paſturage of them, for the Time they had been with him, which amounted to ten Pounds: Afterwards one *Forſter* paying him the ſaid ten Pounds by the Appointment of *Blegrave*, he delivered the five Beaſts unto him; and if *ſuper totam materiam*,

riam, he be Guilty, they find for the Plaintiff, and Damages twenty-five Pounds; and if, &c. then for the Defendant. *Jones* and *Croke* (*absentibus cæteris Justiciariorum*) conceived, That this Denial upon Demand, and Delivery of them to *Forster*, was a Conversion, and that he may not detain the Cattle against him who bought them, until the ten Pounds be paid, but is inforced to have his Action against him who put them to Pasturage: And it is not like to the Cases of an Inn-Keeper or Taylor: They may retain the Horse or Garment delivered to them until they be satisfied; but not when one receives Horses or Kine, or other Cattle, to Pasturage, paying for them a weekly Sum, unless there be such an Agreement betwixt them: Whereupon Rule was given, That Judgment should be entred for the Plaintiff. 3 *Cro.* 271. *Chapman versus Allen.*

When and what may may be detain'd by Tradesmen till paid, when, and what not.

In an Action of Trover and Conversion, nothing was proved but a tortious taking of the Cattle by way of Trespass, and driving them away; and it was ruled a good Ground for this present Action, and a Conversion shall be intended; otherwise when he comes to them by Trover, there an Actual Possession shall be proved. *Cl.* 112. *Beckwith versus Elsey.* 2 *Sid.* 264. *Bruen versus Roe.* agrees as to the first Point; But says, That where the Defendant comes by the Goods by Trover, that an actual Demand must be proved.

Evidence of a tortious taking Goods in Trover.

A. brought an Action upon the Case, and declared, That the Dean and Chapter of *Westminster*, did lease unto him a House for Years by Deed indented, of which Indenture he was possessed, and afterwards lost it; and by Trover it came to the Hands of the Defendant,

Evidence to maintain Trover of an Indenture.

dant, who ſold it, and converted the Money thereof coming to his own Uſe: The Defendant pleaded Not Guilty; and the Plaintiff gave in Evidence, That the ſaid Leaſe was made to him, and to one *B.* and that the ſaid Indenture was delivered to the ſaid *B.* (and that was agreed to be the Poſſeſſion of them both) and afterwards *B.* died; and afterwards *A.* the Plaintiff, was the ſole Owner of it; and that was holden to be good Evidence on the Part of the Plaintiff; and if the Plaintiff can prove the other Part of his Declaration, *i. e.* That the Indenture came into the Hands of the Defendant, and that he ſold it, That then he ſhould recover. But it was given in Evidence on the Defendant's Part, That the ſaid *B.* ſold to the ſaid Defendant his Part and Intereſt in the ſaid Leaſe, and alſo the ſaid Indenture; ſo as now he is become Tenant in Common with the Plaintiff, and then his Sale doth not give any Cauſe of Action to the Plaintiff; and that was holden by the whole Court to be good Evidence without pleading of it; the Caſe went further, That *A.* being within Age, his Father leaſed the Lands for 20 Years; and afterwards the Son at his full Age, upon the Back of the Indenture, did releaſe to the Defendant all his Right. And it was holden by *Wray*, Juſtice, That when the Father leaſed, he did it as Guardian to his Son; and it was not any Ejectment of the Son, but it was a Leaſe in the Behalf of the Son, altho' the Son might avoid it; and then when the Endorſement is *ut ſupra*, the ſame is a good Aſſignment; and after the Plaintiff was nonſuit. 2 *Leon.* 220.

Demand of Satisfaction for the Things.

In an Action of Trover, *&c.* to prove the Converſion, it was offered, That the Plaintiff did demand Satisfaction for the Corn; and it was ruled good Evidence, the Demand being to the Party himſelf, who took the the Corn, tho' the Corn itſelf was not demanded, but Satisfaction; *Quod nota. Clayt.* 122. *Rookeby's* Caſe.

Evidence of a Deed of Gift of Goods.

In Trover and Converſion of Goods to the Defendant's Uſe: Upon not Guilty pleaded, they were at Iſſue, and there an Inventory of the Goods was given in Evidence to the Jury, as the Goods were appraiſed by Upholſters; And in this Evidence another Point did ariſe, theſe Goods were taken in Execution, and delivered to the Defendant by the Sheriff; and afterwards the Owner of the Goods, againſt whom the Execution was awarded, made a Deed of Gift of them to the Plaintiff, by theſe Words, *Scilicet*, he granted all thoſe Goods which were late put in Execution. *Coke*, Chief Juſtice, ſaid, That *Quacunque via data*, that Deed could not entitle the Plaintiff to thoſe Goods; for it is a *Dilemma*; for *Poſito*, that theſe Goods were put in Execution, then they did not paſs; and admit that they were not put in Execution, he did not grant but only thoſe Goods which were in Execution; and ſo there is an Oppoſition; and afterwards Judgment was given for the Defendant. 4 *Leon.* 243. *Arden* and *Goad's* Caſe.

Defendant cannot ſay he is guilty of Felony, to diſcharge himſelf of an Action of Trover.

In an Action of Trover and Converſion; at the Trial, Mr. Attorney General excepted againſt the Evidence, That if it were true, it deſtroyed the Plaintiff's Action; inaſmuch as it amounted to prove the Defendant Guilty of Fe-

Felony; and that they will not ſuffer a Man to ſmother a Felony and bring Treſpaſs for that which is a kind of a Robbery. Indeed, ſaid he, If they had been acquitted or found guilty of Felony, the Action would lie; and therefore it may be maintained againſt Mrs. *Cory*, who was, as likewiſe was *William Maynard*, acquitted upon an Indictment of Felony for this Matter, but not againſt the reſt. But my Lord Chief Baron declared, and it was agreed, That it ſhould not lie in the Mouth of the Party. *Wray*, That himſelf was a Thief, and therefore not Guilty of the Treſpaſs; but perhaps if it had appeared upon the Declaration the Defendant ought to have been diſcharged of the Treſpaſs. *Quære* what the Law would be if it appeared upon the Pleading, or were found by Special Verdict. My Lord Chief Baron did alſo declare, and it was agreed, That whereas *William Maynard*, one of the Witneſſes for the Plaintiff, was Guilty, as appeared by his own Evidence, with the Defendants, but was left out of the Declaration, that he might be a Witneſs for the Plaintiff; that he was a good and legal Witneſs, but his Credit was leſſened by it; for that he ſwore in his own Diſcharge; for that when theſe Defendants ſhould be convicted, and have ſatisfied the Condemnation, he might plead the ſame in Bar of an Action brought againſt himſelf; but thoſe in the *ſimul cum* were now Witneſſes. Several witneſſes were received and allowed to prove that *William Maynard* did at ſeveral Times diſcourſe and declare the ſame Things, and to the like Purpoſe that he teſtified now. And my Lord Chief Baron ſaid, Tho' a Hear-ſay was not

to be allowed as a direct Evidence, yet it might be made uſe of to this Purpoſe; *viz.* to prove that *William Maynard* was conſtant to himſelf, whereby his Teſtimony was corroborated. One *Thorn*, formerly Mr. *Reynel*'s Servant, being Subpœna'd by the Plaintiff to give Evidence at this Trial, did not appear. But it being ſwore by *Exeter* Waggoner, That *Thorn* came ſo far on his Journey hitherward as *Blanford*, and there fell ſo ſick that he could not travel any farther; his Depoſitions in Chancery, in a Suit there between theſe Parties about this Matter, were admitted to be read. 1 *Mod.* 282. *Lucy Luttrel v. G. Reynel*, Eſq; *G. Turbervile*, Eſq; *J. Cory* and *Ann Cory*.

Any thing by a Releaſe may be given in Evidence.

In Trover for Jewels, it was ſaid by *Twiſden*, There is no Plea in Trover but a Releaſe, or Not Guilty; every Special Plea in Juſtification, being but Tantamount. 1 *Keb.* 305. *Devoe ver.* Dr. *Coridon.*

Diſtringas amended by the *Venire Facias.*

Action for Trover; in the *Diſtringas Jurat.* the Defendant was named *Shacraft*; but in the *Venire Facias*, and all other Proceedings, he was truly named: And this Miſnomer was was alledged in Arreſt of Judgment. *Wray*, The Difference here is little; and in ſome Countries (*a*) is founded for (*o*) and ſo it is not material; and it was awarded to be amended; and the Plaintiff had Judgment. 1 *Cro.* 258. *Denner v. Shacroft.*

Damages, how to be aſſeſſed in Trover where there are ſeveral Defendants.

In Trover and Converſion of 2000 Loads of Coals; upon Not Guilty pleaded, the Defendants were found Guilty ſeverally, for ſeveral Loads of Coals, and were found ſeverally not Guilty for the Reſidue, and Judgment accordingly, and intire Damages; and one

one *ideo in miſericordia* againſt the Defendants, and one *ideo in miſericordia* againſt the Plaintiff, *pro falſo clamore*; and thereupon a Writ of of Error was brought in the Exchequer-Chamber: and the Error aſſigned, Becauſe the Judgment was againſt both the Defendants, for ſeveral Damages, ſeverally; for it was alledged, that ſeveral Damages ought not to be aſſeſſed; but there being a joint Trover and Converſion laid to their Charge, they ought to have been both found Guilty; and they ought not to have been divided in the Verdict, and in the aſſeſſing of Damages; and if they might be ſevered, yet the Plaintiff ought to have but the Damages given againſt one of them, as it is in Sir *John Heydon*'s Caſe. *Coke Rep.* 11. *fol.* 5. and 44 *Ed.* 3. 7. But all the Juſtices and Barons agreed, That the Plaintiff ſhould have ſeveral Damages; for being found ſeverally Guilty, of ſeveral Parcels converted, he ſhall have Judgment accordingly; and it is not like Sir *John Heydon*'s Caſe, where there was but one joint and ſole Treſpaſs of Battery, and ſo found; and there, altho' the Damages were ſeverally aſſeſſed, yet the Plaintiff ought to take his Judgment for Damages but of one: But becauſe the Treſpaſs is ſeveral, and ſo found, *viz.* the one at one Time, and the other at another, altho' it be contrary to the Suppoſal of the Writ, yet being found by Verdict, it ſhall not abate the Writ; and the Plaintiff ſhall recover according to the Verdict, as it ſaid there in the ſame Caſe: So here, this being ſeverally found, and the Converſion by them ſeverally, of ſeveral Things, the Damages are well aſſeſſed ſeverally, and he ſhall have Judgment againſt them ſeverally for Damages, according to the Verdict: And it was ſaid,

Judgment, how to be enter'd where ſeveral Defendants.

That there were divers Precedents in the King's Bench, and Common Bench, to that Purpoſe. The ſecond Error aſſigned, was, That there ought to have been ſeveral Judgmentes *de ideo in miſericordia* againſt the Defendants; and being otherwiſe it is Error. But againſt that it was reſolved, that there ſhall be one Judgment only of *Miſericordia* altho' the Defendants be ſeverally found Guilty; and ſo are the Precedents; whereupon the Judgment was affirmed. *Vid.* 44 *Ed.* 3. 6. & 6. 9 *Hen.* 6. 2. 22. *Aſſiſ.* 76. 3 *Cro.* 54. *Player v. Warn* and *Dewes.*

How the Verdict ſhall be enter'd.

A Writ of Error was brought to reverſe a Judgment given in an Action of Trover and Converſion for theſe Errors; Firſt, It is ſaid of the Jurors in entring of their Verdict, *Dixerunt pro querente*; and Secondly, In the awarding of the *Venire*, it is *ideo præcept: fuit*, with an *&c.* and ſo it is not certain whence the *Venire* iſſued, as it ought to be. The Rule was, the Judgment ſhould be reverſed *Niſi.* *Style*, 195. *Batisford* againſt *Yate.*

Venire, how to be awarded.

No Judgment ſhall be againſt one Defendant in Trover, tho' found Guilty, if it be alſo found that the Plaintiff releaſed to the other.

Trover was brought againſt two Defendants; one pleaded Not Guilty, and a Verdict againſt him. The other pleaded a Releaſe of all Actions, *&c.* and had a Verdict for him. Sir *William Williams*, moved for Judgment againſt the other Defendant who was found Guilty, but it was denied; becauſe the Trover being joint, a Releaſe of all Actions diſcharged both. *Vide The Preface to Hobart's Reports in Cock verſus Fenmour.* 4 *Mod.* 379. *Kiffin verſus Willis* and *Evans.*

Trover

Trover by five; and before Verdict one of them dies, and they proceed to Trial, and Verdict for the Plaintiffs; and then the Plaintiffs ſuggeſt, That one of them is dead, and pray Judgment for the Reſt, and had it; and the Defendants bring a Writ of Error; and aſſigned for Error, That the Party died before Verdict, and ſo Verdict was given for a dead Perſon. And after Argument at the Bar Judgment was reverſed; becauſe every Man ſhall recover according to the Right which he hath at the Time of the bringing the Action; and therefore, if the Heir brings an Ejectment, and his Anceſtor dies ſubſequent to his Action, he ſhall not recover. And in this Caſe, altho' the Plaintiffs were Jointenants, and had a Capacity of having the whole ſurvive; yet in Truth, every one had but a Moiety, and ſo were not at the Time of the Action intitled to ſo much as they are after the Death of one of the Plaintiffs. And as to the Caſe of 2 *Bulſt.* 262. *Spring*'s Caſe, He reports the Reaſon of the Judgment to be, becauſe by the Death of the one the Action ſurvives to the other: But he miſtakes the Reaſon, as appears by *Read* and *Readman*'s Caſe. As to the Caſes where Treſpaſs is brought againſt many, and one dies, they differ much from this Caſe; becauſe there the Treſpaſs is Joint or Several, at the Pleaſure of the Plaintiff; as to the Caſe of a Replevin, 3 *Cro.* 574. tho' an Avowant is to ſome Purpoſes a Plaintiff, yet he doth not bring the Action; and ſo not within the Rule, That the ſame Right muſt continue which was at the bringing the Action; and ſo Judgment was agreed to be reverſed by

Judgment in Trover reverſed, becauſe one of the Plaintiffs died before Verdict.

the Opinion of three againſt *Dolben*, who deſired Time to conſider. *Raym.* 463. *Wedgewood* and others *verſus Baily* and others.

Judgment muſt be for Damages only.

In Trover of a Horſe, the Judgment was, *Quod recuperet equum vel damna'*, whereas it ought to have been for Damages only; and for this Cauſe it was reverſed. 1 *Cro.* 116. *Knight v. Bourne.*

Judgment *v.* Baron and Feme in Trover, how to be.

On Error of a Judgment in *Norwich*, in an Action of Trover of Goods, againſt the ſaid *Wood*, and *Anne* his Wife, of the Trover and Converſion of the ſaid Feme, during her Coverture; the Defendants plead Not Guilty, and found againſt them for Part, and for the other Part it was found for the Defendants, and the Judgment was *Quod quereus recuperet*, his Damages found; and that the Defendant *Anna ſit in miſericordia*, and that the Plaintiff, *per falſo clamore quoad reſiduum unde Defendentes acquietati exiſtunt ſit in miſericordia.* The Error aſſigned, firſt, becauſe the Judgment is, That the Feme *ſit in miſericordia*; whereas it ought to be, That the Baron and Feme *ſint in miſericordia*; for ſhe cannot pay it without her Huſband; alſo, becauſe the Baron pleads with the Feme, and doth not confeſs the Action; for that is the Cauſe of the *miſericordia.* Alſo the uſual Courſe is in Actions againſt Baron and Feme for Treſpaſs done by the Feme during the Coverture, if they be thereof convicted, to have the Judgment, *Ideo Capiantur*, againſt both; yet there is no Offence by the Baron himſelf; and all the Clerks affirmed that ſo was their Courſe. Another Error was aſſigned, becauſe the Judgment is not *Quod Defendens eat ſine die*; and for both Cauſes it was held to be erroneous, but principally for the firſt, wherefore Judgment was reverſed.

2 *Cro.*

2 *Cro.* 432. *Wood & Ux. verſus* Doctor *Suckling.*

Bigg brought an Action of Trover and Converſion of a Horſe, and had a Verdict and a Judgment. The Bail for the Defendant in the Action brought a Writ of Error to reverſe this Judgment given againſt the Principal. The Court was moved to abate the Writ; the Court anſwered, If the Writ of Error be brought upon the principal Judgment it ought to be abated. It hath been a Queſtion heretofore, Whether a Writ of Error brought upon the principal Judgment, and alſo upon the Judgment given againſt the Bail, together, be good in Part, and ill for the other Part? But of later Times it hath been ruled, That it ought to abate for all. Therefore let the Party ſhew Cauſe why the Writ ſhould not be abated here. *Style* 174. *Shayler* againſt *Bigg.*

A Writ of Error cannot be brought on the principal Judgment by the Bail in Trover.

In an Action of Trover and Converſion, and the Declaration upon the Imparlance-Roll had Spaces for the Day and Year, of Loſing, Finding, and Converſion of the Goods; but the Iſſue-Roll, and all the reſt, were perfect in this Point.

Spaces in the Imparlance-Roll aided by Verdict.

And the Court was of Opinion, That the Imparlance-Roll could not be amended, and made perfect by the Iſſue-Roll, becauſe it was the Original, and was to warrant the other, and not *é converſo* But yet becauſe upon Iſſue Not Guilty, Verdict was given for the Plaintiff, the Court gave Judgment for him; becauſe the Declaration, as it was found in the Imparlance-Roll, was good enough in Matter; for the Trover and Coverſion was laid in the *Preterperfect tenſe*, and ſo before the Action brought; and ſo the Fault in the Declaration

ration being but in Form, was holpen by the Statute of *Jeofails*. *Hob.* 76. *Parker v. Parker. S. C. Hutt.* 14. *S. C.* 1 *Brown.* 9.

Want of a Bill or Bail, are both aided by Verdict.

In Trover and Converſion of Goods in the King's Bench; the Defendant pleaded Not Guilty; the Plaintiff had a Verdict and Judgment: The Defendant brought a Writ of Error and aſſigned two Errors; the one, That there was no Bill filed; the other, There was no Bail. And upon a *Certiorari* in that Caſe awarded and returned, it was certified, That there was neither Bill nor Bail filed; and the Judgment, notwithſtanding the ſaid Errors, was affirmed *in Cam. Scacc. Tr. Anno* 17. *Dom. Regis, viz.* 5. *die Julii in eodem term*, and the Record and the Proceedings on the ſame Writ of Error were remanded, *eod. Ter. in Banco Regis. qu. Vide tamen* 16. *R.* 1. *rot.* 945. *in Banco Regis ubi tam prim' Judicium quam ſecundum intratur.*

1. The want of a Bill being the Original, was taken to be within the Meaning and Intent of the Statue of 18 *Eliz. c* 14. and remedied by the Equity of that Statute.

2. The want of the Bails was not material, becauſe it might be that the Defendant was in *Cuſtod. Ma.* at the Time of the Plaintiff's Bill exhibited, according as the ſaid Bill ſuppoſed. *Hob.* 264. *Willis v. Woodhouſe.*

The End of Actions on the Caſe for Trover and Converſion.

CHAP.

CHAPTER.

Of Actions on the Caſe for malicious Proſecutions in Courts of Juſtice.

THE Law having provided for the due Puniſhment of Offences, and the compelling all Perſons to do Juſtice; which Proviſions being often of late Years perverted and abuſed for the oppreſſing the Innocent; ſuch Wrongs are compenſated by the Damages the injured Perſon may recover in Actions on the Caſe. And as unjuſt Proſecutions are as various as thoſe that are otherwiſe, Actions on the Caſe for them are moſt properly divided, as Proſecutions and Suits are; *viz.* Into thoſe in the Spiritual Courts, Criminal, or Civil: Of all which we ſhall treat in the three Firſt Sections of this Chapter; and in the fourth add ſome Precedents of Declarations in ſuch Actions, with References to all the other Precedents that are extant in the Books of Entries.

SECT.

SECT. I.

Of Actions on the Case for malicious Proſecutions in the Eccleſiaſtical Courts.

Caſe *per* old Church-wardens *v.* the new ones for malicious ſuing in the Spiritual Court.

AN Action upon the Caſe; the Plaintiff declares, That he being Church-warden of a Pariſh, and having given an Accompt at the End of his Year to his Succeſſor and the Pariſhioners, the Defendant falſly and malitiouſly cited him into the Eccleſiaſtical Court, to render an Accompt; and there, at the Defendant's Requeſt, they excommunicated the Plaintiff for not rendering an Accompt: Upon Not Guilty pleaded, and Verdict for the Plaintiff, *Saunders* moved in Arreſt of Judgment, becauſe the Sentence was given by the Judge, and ſo he and the Court were to blame, and not the Defendant. *Ray.* 418. *Gray v. Day. S. C. T. Jones*, 132.

Caſe *v.* Apparator for *ex officio* citing the Plaintiff for Incontinency.

In an Action upon the Caſe, the Plaintiff declared, That the Defendant being an Apparator under the Biſhop of *Exeter*, maliciouſly, and without Colour or Cauſe of Suſpicion of Incontinency, of his own proper Malice, procured the Plaintiff *ex Officio*, upon Pretence of Fame of Incontinency with one *Edith*, (whereas there was no ſuch Fame, nor juſt Cauſe of Suſpicion) to be cited to the Conſiſtory-Court of *Exeter*, and there to be at great Charges and Vexation, until he was cleared by Sentence, which was to his great Diſcredit, and Cauſe of great Expence and Loſſes; for which, *&c.* Upon Not Guilty pleaded, and found for the Plaintiff, it was moved in Arreſt of Judgment, That in this Caſe

Caſe, an Action lies not; for he did nothing but as an Informer, and by Virtue of his Office. But all the Court (*abſente Richardſon*) held, That the Action well lay; for it is alledged, That he *falſo & malitioſe* cauſed him to be cited, upon Pretence of Fame, where there were no Offence committed; and avers, That there was no ſuch Fame, ſo as he did it maliciouſly, and of his own Head, and cauſed him to be unjuſtly vexed, which was to raiſe Gain to himſelf; whereupon they conceived he being found Guilty for it, the Action well lies; and therefore Rule was given to enter Judgment for the Plaintiff, unleſs other Cauſe was ſhewn: And upon a ſecond Motion, *Richardſon*, Chief Juſtice, being preſent, Judgment was given for the Plaintiff. 3 *Cro.* 291. *Carlion verſus Mill. S. C. W. Jones.* 213.

The Action lies.

An Action upon the Caſe was brought for maliciouſly Pleading, and cauſing him to be excommunicated in the Eccleſiaſtical Court; whereby he was taken upon an *Excom' Cap'*, and impriſoned until he got himſelf abſolved. The Defendant pleaded Not Guilty, and found againſt him: And it was afterwards moved in Arreſt of Judgment, That the Declaration was not good; for no Action will lie for ſuing a Man in the Spiritual Court, tho' without Cauſe, no more than for ſuing in the Temporal Courts. For *Fitz. N. B.* is, That a Man ſhall not be puniſhed for bringing the King's Writs. So *Hob. Waterer* and *Freeman*'s Caſe. And it hath been lately held, That no Action will lie for an Indictment of Treſpaſs, tho' *falſo*; but an Action of the Caſe will lie for ſuing in Court-Chriſtian for a Temporal Cauſe.

Caſe for maliciouſly ſuing one to Excommunication.

But

Diverſity.

But the Court in this Cauſe gave Judgment for the Plaintiff; for tho' in an Action between Party and Party in the Eccleſiaſtical Court; where (if the Matter goes for the Defendant) he ſhall have his Coſts, no Action will lie if the Court hath Juriſdiction; yet where there is a Citation, *ex Officio*, and that is proſecuted maliciouſly, without Ground, the Party ſhall have his Action; for in ſuch Suit he can have no Coſts, and ſo in *Carlion* and *Mill*'s Caſe adjudged. 1 *Cro.* 291. And this ſhall be ſo intended after the Verdict, or otherwiſe the Defendant ſhould have ſhewed it to be otherwiſe, and juſtified. And *Rainsford* ſaid, Without Cauſe, ſhall be underſtood, without any Libel or legal Proceedings againſt him. 1 *Ven.* 86. *Hocking v. Mathews.* *S. C.* 1 *Lev.* 292.

In Caſe v. Churchwardens for maliciouſly proſecuting one in the Spiritual Court, on Verdict for them, they ſhall not have double Coſts.

Action upon the Caſe againſt them, becauſe they being Churchwardens of ——— preſented the Plaintiff *falſo & malitioſe*, upon a pretended Fame of Incontinency. Upon Not Guilty it was found for the Defendants, and moved, That they might have double Coſts, becauſe they were troubled and vexed for Matter which did concern their Office. But it was reſolved, It was not within the Statute; for it is merely Eccleſiaſtical; and the Statute was never intended, but where they ſhall be vexed concerning temporal Matters, which they ſhall do by Vertue of their Office, and not for Proſecutions concerning Matters of Fame. 3 *Cro.* 285. *Kerchevall verſus Smith.* And *S. C. W. Jones*, 285.

An

In An Action on the Caſe, the Plaintiff declared, Whereas the Defendant was Vicar of *Lanham*, and the Plaintiff a Pariſhioner there, and the Tithes appertained to the Defendant; the Plaintiff had paid him his Tithes in the Preſence of two Witneſſes, the one of thoſe Witneſſes being dead, the Defendant had again ſued him for theſe Tithes paid unto him, well knowing that the Proof of Payment by one Witneſs, is not ſufficient in the Spiritual Court, *&c.* The Defendant pleaded Not Guilty, and found, That the Plaintiff had paid his Tithes, but one of theſe Witneſſes named was dead before the Payment, *&c.* and found all the Reſidue, *ut ſupra*, *Et ſi*, *&c.* And all the Court held, That upon this Matter the Action lies not; for the Action lies not for the proſecuting at the Common Law without Cauſe; the ſame Law is for proſecuting a Suit in the Spiritual Court. For *Popham* ſaid, When a Man complains in a Court, which hath Power to give him Remedy for the ſame Cauſe, altho' his Suit be without Cauſe; yet the Plaintiff ſhall not be puniſhed by an Action on the Caſe; but if a Man libels in the Spiritual Court for a Temporal Matter, there peradventure an Action on the Caſe will lie; ſo it is, where a Man brings in the Common Bench, Action upon the Caſe lies; whereto *Gawdy* and *Fenner* agreed, and ſaid, how 8 *Ed.* 4. 13. is, That an Action upon the Caſe lies, where he ſues one for Tithes who ought to be diſcharged, yet is not like to this Caſe; by the ſame Reaſon, if one hath paid a Debt upon an Obligation, and is ſued for it again, an Action upon the Caſe lies, which is not Law. Wherefore they all agreed againſt the Plaintiff.

No Action lies for ſuing without Cauſe of Action in the Spiritual Court.

Nor for ſuing at Common Law without Cauſe.

But Caſe may lie for ſuing in the Spiritual Court for that which they have no Conuſance.

Plaintiff. *Sed adjournatur.* 1 *Cro.* 836. *Bray v. Patrid.*

See *Litt. Rep.* 314. *Eaton v. Shermon.* Notwithſtanding both which Caſes the Law ſeems to be now ſettled, that an Action will lie.

Caſe *per* Baron and Feme for a malicious Preſentment in the Spiritual Court.

Action upon the Caſe; for that the Defendant being Vicar of the Pariſh where they inhabited, falſly and maliciouſly in ſuch a Court of the Ordinary, preſented, That they made Hay upon the *Sunday*: Whereupon they were cited and vexed, *&c.* after Not Guilty pleaded, and Verdict found for the Plaintiff, it was moved in Arreſt of Judgment, That the Action lies not for Baron and Feme; for their Vexation is ſeveral; at leaſtwiſe the Feme cannot have Damages for the Vexation to her Husband.

Secondly, That for this Preſentment in Courſe of Law, and alſo in the Spiritual Court, this Temporal Action lies not: The Court doubted upon theſe Reaſons and Exceptions, whether the Action were maintainable; and therefore is was adjourned. 2 *Cro.* 155. *Weald* and his Wife *ver. Peaſe.*

SECT. II.

Of Actions on the Caſe for malicious Accuſations of, and Proſecutions for, Criminal Matters.

For Accuſing one of Felony before a Juſtice.

IN an Action upon the Caſe for charging the Plaintiff with Felony, and cauſing a Conſtable to carry him before a Juſtice of the Peace, and accuſing him to the Juſtice in theſe Words, *He did come to my Doors, and ſet a Piſtol to my Breaſt, and demanded Money of me; and I, for Safegard of my Life,*

did give him what Money he deſired. Upon Not Guilty pleaded, and a Verdict for the Plaintiff, it was moved, That the Words were not actionable, and therefore the Plaintiff ought not to have Judgment; and that for theſe Reaſons. 1ſt, Becauſe there is but a Matter of Treſpaſs alledged in the Words. 2ndly, They are but Argumentative, and do not charge the Plaintiff directly with Felony; and it may be the Money demanded was due to the Defendant, and the Jury have found all that which ſounds to charge to Party with Felony againſt the Plaintiff. *Twiſden*, on the other Side, ſaid, That the Words ought to be taken together; and ſo they are actionable, and ought not to be ſevered; and the Ground of the Action is for charging him with Felony, and bringing him before the Juſtice; if theſe Words ſound to charge him with Felony, the Action will lie, and we cannot conceive otherwiſe but that he would have robbed the Party, and we ought not to divide the Words; for this were to argue *a male diviſis*: And you might have pleaded Specially, or have given the Special Matter in Evidence. *Jerman*, Juſtice, differed; but *Nicholas* and *Ask*, Juſtices, agreed with *Rolle*; and ſo Judgment was given for the Plaintiff. *Niſi, &c. Style* 350. *Nave* and *Croſs*.

In an Action for Words; for that the Defendant, *falſo & malitioſe crimen feloniæ ei impoſuit*, and cauſed him to be arreſted for Felony. The Defendant pleaded, That the Plaintiff aſſaulted him upon the Highway, near *Highgate*, and beat him, whereupon he complained to the Conſtable of this Matter, and deſired the Conſtable to attach him; and he refuſed,

Caſe *quare crimen feloniæ impoſuit.*

Plea containing the Grounds of the Accuſation.

refuſed, unleſs the Defendant would ſay, That he charged him with Felony; which Speaking, occaſioned as aforeſaid, is the Speaking. Upon which Plea the Plaintiff demurs; and it was moved, That this is no Colour of Plea; for the Defendant does not ſhew any Cauſe to charge him with Felony; therefore this is no Excuſe or Cauſe of Juſtification of theſe Words: And of this Opinion was all the Court; and gave Rule for Judgment for the Plaintiff unleſs, *&c.* Afterwards the Defendant moved, That the Action lies not for theſe Words; for it is, That *crimen feloniæ ei impoſuit*, which is not in itſelf Cauſe of Action; and for that he cited a Caſe to be adjudged in this Court, *Mich* 2 *Car.* betwixt *King* and *Meller*, where an Action on the Caſe was brought, becauſe *crimen feloniæ ei impoſuit*, and ſaid to the Conſtable preſent, I charge you to arreſt him for Felony. And after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That theſe Words were not actionable, and adjudged by the Court for the Defendant, and ſhewed a Copy of the Record: To which it was anſwered, If it were adjudged, it was becauſe the Words were not laid to be ſpoke of the Plaintiff. And as this Caſe is the Action lies; for it is a malicious Scandal, when he chargeth him with Felony; and in his own ſhewing doth not ſay what Felony was committed; and Judgment was given for the Plaintiff, unleſs, *&c.* 3 *Cro.* 276. *Smith v. Hodgeskins.*

An

An Action upon the Caſe was brought, for that the Defendant *ex malitia* upon the Plaintiff's Wife *crimen felonie impoſuit* and had cauſed her to be brought before Mr. *Gregory*, a Juſtice of the Peace of the County of Oxon, and *falſo & malitioſe*, ſaid, before him *ad tunc & ibidem*, That he charged her with Felony, for ſtealing of an Hog from one *Hundby*, his Couſin, and required that ſhe might be bound over to the Aſſiſes; whereupon ſhe was inforced to find Sureties for her Appearance at the Aſſiſes. After Verdict upon Not Guilty pleaded, and found for the Plaintiff, and forty Shillings Damages aſſeſſed, *Littleton*, Recorder of *London*, moved in Arreſt of Judgment, That the Actions lies not: Firſt, Becauſe they do not ſay that the Defendant *falſo* impoſed upon her the Crime of Felony. Secondly, For that they do not ſhew the Day and the Place, when and whether he cauſed her to be brought. Thirdly, Becauſe they join Actions for Words, and in Nature of a Conſpiracy together; *ſed non allocatur*; For when they ſay, that the Defendant, *ex malitia* impoſed *crimen felonie*, that implies *falſo*; and when it is ſaid, He cauſed her to be brought before a Juſtice of the Peace; that is coupled with the other, and ſhall be intended the ſame Time and Place; eſpecially when it is afterwards, That he *adtunc & ibidem* charged her with Felony: And for the other Matter, it is not in the Nature of a Conſpiracy, but an Aggravation of the falſe and malitious Accuſation; whereupon it was adjudged for the Plaintiffs. 3 *Cro.* 271. *Manning* and his Wife *v. Fitzherbert.*

Caſe for accuſing one of Felony, and cauſing the Party to appear before a Juſtice of the Peace.

Exceptions to the Declaration.
1ſt, For not ſaying *falſo.*
2dly, No Place of the bringing the Party before the Juſtice.
3dly, Joining Words and Caſe for Conſpiracy together,

But all over-ruled.

How to plead in Case for accusing one of Felony.

Per Richardson, Chief Justice, in an Action for accusing the Plaintiff of Felony, and causing him to be carried before a Justice of the Peace; the Defendant ought to justify that there was a Felony done, and that he suspected the Plaintiff. *Hetl.* 165. *Butt v. Foster. S. P. Cro. Eliz.* 134. *Knight v. Germyn.*

Case in the Nature of a Conspiracy for accusing the Plaintiff of Felony, and putting him into Prison.

In an Action upon the Case in Nature of a Conspiracy, the Plaintiff declared, That the Defendants, *per Conspirationem inter eos habitam* to vex and oppress him, did (*pretextu cujusdam Warranti* from Sir *S. Lovell*, Recorder of *London*, wherein the Plaintiff was charged by Oath of one *Ashby*, to have Assaulted the said *Ashby* on the Highway, with intent to rob and murder him) arrest him, the Plaintiff, and carry him before *Chamberlain*, a Justice of Peace, who, *ex Persuasione* of *Tracy*, refused to Bail him, tho' good Bail were tendred; and *Chamberlain* committed him to the Prison of the *Gate-house*, where such and such Sums of Money were extorted from him, and not said in the whole Declaration that it was without probable Cause.

Upon Evidence, before *Holt*, Chief Justice, it appeared, That eight Years ago, *Muriell* being a Gentleman's Servant, and riding one Day abroad, had fallen out with *Ashby* on the Road, and being in Drink was soundly beat by him; notwithstanding which, *Ashby* took out immediately a Justice's Warrant for *Muriell* for an Assault and Battery; but nothing more was done upon it. Six Years after some Difference arising between *Muriell*, *Stracy* and *Jenkins*, here in *London*, *Jenkins* goes down to *Suffolk*, and, at the Perswasion of *Cornwaill*, prevails with *Ashby* to come up to *London*,

don, to make the Oath above-mentioned againſt *Muriell*, which he did before the Recorder, whereupon the Warrant was granted, and had a Guinea from *Jenkins* for his Pains. Now a Twelvemonth after, *Tracy* being himſelf a Juſtice of Peace, employs the Under-Keeper of the *Gatehouſe*, and others, to take up *Muriell*, and to carry him before Juſtice *Chamberlain*. and ſend him Word as ſoon as they took him, which accordingly was done. And *Tracy* informed *Chamberlain*, That he had adviſed with the Recorder, and other Lawyers, about the Offence charged upon *Muriell*, and that they were of Opinion, It was not bailable; whereas in Truth he never did ask the Queſtion; whereupon *Chamberlain* refuſed bail, and committed him. *Tracy* follows him to Gaol, and directs the Gaoler to uſe him ſeverely, and to iron him.

Holt, Chief Juſtice, as to *Chamberlain*, he was to blame for his Ignorance; but no Reaſon to find him Guilty upon this Evidence; but for the reſt, the Circumſtances of the Evidence ſhew it to be all one Chain of Malice; and if the Declaration were good, the Evidence would maintain it.

Ignorance excuſes the Juſtice of the Peace.

But Exceptions taken to the Declaration were,

1. That it recited a Warrant variant from that on which the Plaintiff was arreſted; for the Recital was abſolute and poſitive, that the Oath was that the Plaintiff had aſſaulted *Aſhby*, with Intent to rob and kill him; but the Warrant was with Intent, *&c.* as he believes. But no great Heed was had to that Objection: But *Holt*, Chief Juſtice, ſaid, It ſhould be ſaved to them.

How the Juſtices Warrant ſhould be recited.

Pretextu cujusdam Warranti, what good.

2. Exception was, That the Declaration ſuppoſed the Arreſt to be without a legal Warrant; for it was, That *pretextu cujuſdem Warranti*, and *pretextu* was the ſame with *Colore*, and that muſt be taken as if no Warrant had been: But that was over-ruled; for there being an ill Uſe made of this Warrant, tho' it were legal, ſure that were *pretextu* of a Warrant.

Declaration held ill, for not ſaying with probable Cauſe.

3. If it be taken to be a legal Warrant, there can be no Conſpiracy in taking up one by a legal Warrant; eſpecially, it not being laid, that the Warrant was taken out without probable Cauſe.

Upon this Exception, *Holt*, Chief Juſtice, willed them to withdraw a Jury; for he held the Declaration ill for not alledging to have been without probable Cauſe. And to this the Parties conſented. *Mod. C.* 169. *Muriell verſus. Tracy, Jenkins, Chamberlain* and *Cornwaill.*

In Caſe Quare crimen felonie impoſuit, mere words will not be ſufficient Evidence.

Caſe for that the Defendant *tali die & loco falſo & malitioſe ei crimen felonie impoſuit*: Moved, That it was too general and uncertain; and *per Cur'*, No other Act held neceſſary to be alledged: But yet Words importing a Charge of Felony will not be Proof of it; there muſt be Proof of ſome Act. *Judic. pro Quer'. Show.* 282. *Haynes verſus Rogers.* 2 *Sid.* 95 *Saunders ver. Edwards. S. C.* 1 *Keb.* 389.

Caſe for maliciouſly indicting the Plaintiff for endeavouring to ſeduce A. to Popery, of which he was acquitted.

An Action on the Caſe was brought; for that at the general Gaol-Delivery for the County of *Warwick*, held at *Warwick*, 6 *Aug.* 8. *Jac.* before Sir *Peter Warberton*, one of the Juſtices of the Common Bench, and Sir *Thomas Forſter* another of the Juſtices of the Common Bench, Juſtices of the Peace, *nec-*

rum ad diversas felon. audiend. & terminand. Assignat. the Defendant *falso & malitiose sine ulla vera & legitima causa* procured the Plaintiff to be indicted; that he *voluntarie felonice & proditorie* endeavoured and practised to perswade and withdraw the Defendant, being a Subject of the King's, from his Obedience, unto the Romish Religion, against the Force of the Statute, *&c.* and imprisoned, and detained him until at the same Gaol-Delivery, before the said Justices he was *debito modo & secundum legem, &c. acquietatus*; and Judgment given upon an *nihil dicit*: And a Writ of Inquiry of Damages being awarded, 55*l.* Damages were found and returned: And it was now moved in Arrest of Judgment, That the Declaration was not good; because that it is of an Indictment at a Gaol-Delivery, before, *&c.* and he doth not shew that they were Justices *ad Gaolam deliberand. Assignati.* And altho' it be shewn they were Justices of Peace, and of *Oyer* and *Terminer*, and were in Truth Justices of Assize, *& ad Gaolam deliberand.* yet because it was not shewn that they were Justices *ad Gaolam deliberand.* in whose Right the Indictment was taken, the Court held, That the Declaration was not good. But *Coke* said, That he conceived that for another Cause the Action lay not; for no Conspiracy or Action upon the Case in Nature of a Conspiracy, lieth for the procuring one to be indicted of Treason; for every Man is bound to discover Treason, and ought not to conceal it for the least Time, because it is against the State of the Commonwealth, which every one is in Duty to maintain; and Treason is secret, and lieth in the Heart of a Man, and every

Motion in Arrest of Judgment, for not saying they were Justices *ad Gaolam deliberand.*

No Conspiracy or Action on the Case lieth for procuring one to be indicted of Treason.

one is bound to diſcloſe ſuch Matters as tend thereto: And it being dangerous for any Man to conceal any Thing which may tend to Treaſon; therefore the procuring one to be indicted concerning it, is no Cauſe of Conſpiracy; for altho' an Action of the Caſe has been maintained, for procuring one to be indicted of Felony; yet ſuch an Action was never brought, for procuring one to be indicted of Treaſon. Wherefore they would well adviſe whether ſuch an Action did lie; whereupon the Judgment was ſtaid, *quouſq; &c.* And no Judgment ever was given. 2 *Cro.* 357. *Lovett ver. Fawkner. S. C.* 1 *Roll. Rep.* 109. *S. C.* 2 *Bulſt.* 207. Yet *Quære* why ſhould this Action not lie, if the Malice were apparent? For an Indictment and Writ of Conſpiracy ſeem to lie in ſuch Caſe. See 24 *Ed.* 3. 349. 2 *Inſt.* 562. 3 *Inſt.* 143. 27 *Aſſ. pl.* 59.

What Act won't ſubject one to an Action.

A Man may well encourage one that was robbed, to cauſe the Felon to be indicted, and accompany him to the Aſſiſes; and this ſhall be lawful for to do, without incurring the Danger of an Action upon the Caſe upon Conſpiracy; but if he knew that he was not robbed, then he is in Danger of the Action upon the Caſe. 1 *Brownl.* 9. *Stone v. Bates.*

A Man had Goods taken from him; which taking he ſuppoſed to be Felony, but it is not, and he complains to a Juſtice of Peace of that, who commits the Defendant, and binds the other to proſecute: And he accordingly preferred a Bill at the Seſſions, and the other is acquitted; and the Opinion of *Hutton* in this Caſe was, That this is not puniſhable by an Action upon the Caſe in the Proſecutor; for that ſhall never

never be mentioned without apparent Malice in the Proſecutor. *Win.* 73 *Mankleton* and *Allen.* See *Mod. C.* 25. & 73.

An Action upon the Caſe was brought againſt one for cauſing the Plaintiff to be indicted of Rebellion and Felony; the Defendant moves in Arreſt of Judgment, and ſhews, That the Declaration was incertain; for it ſets forth an Indictment *in quo crimen Rebellionis ei impoſuit & felonii*, which Words were ſo incertain, that it appears not what the Plaintiff was charged with in the Indictment; and ſo there could never have been any Judgment given againſt. *Maynard*, on the other Side, ſaid, It was well expreſſed, and could not well be otherwiſe expreſſed than it is. *Bacon*, Juſtice, There may be Rebellion which is not Capital; as Rebellion in Chancery. But *Rolle* differed in Opinion, and ſaid, The Intent of the Words ſpoken is to be conſidered. The Rule was to bring Books to the Judges. *Style* 104.

Caſe for Indictment of Felony and Rebellion.

Certainty in the Declaration.

An Action on the Caſe, in Nature of a Conſpiracy; for that the Defendant falſly and maliciouſly, *apud Weſt-Allington*, charged him with Felony, and there cauſed him to be brought before Mr. *Gilbert*, a Juſtice of the Peace, and procured him to bind the Plaintiff for his Appearance at the general Gaol-Delivery in the County of *Devon*; that the Defendant there exhibited a Bill of Indictment, which was found to be *minime vera*, whereby he was much damnified, and put to great Expences. The Defendant pleads, That he had divers Sheep ſtolen, and miſſed divers others, which were found in the Plaintiff's Poſſeſſion, going with twelve Sheep which were

Caſe lies for maliciouſly procuring one to be indicted.

were ſtolen, whereupon he complained thereof to the ſaid Mr. *Gilbert*, who examined him, and finding him variant in his Examination, bound him to appear at the General Gaol-Delivery, and the Defendant to give Evidence. Whereupon he at *Exeter*, at the Gaol-Delivery, exhibited his Bill, which is the ſame Conſpiracy. The Plaintiff ſaith, *De Son Tort Demeſne ſans tiel Cauſe*, and Iſſue thereupon, and found for the Plaintiff. And it was moved in Arreſt of Judgment, Firſt, That is no Conſpiracy, being but by way of Complaint to a Juſtice of Peace. Secondly, That the *Venire Facias* is awarded of *Weſt-Allington*, where it ought to have been alſo of Extent; for all the Cauſe is in the Iſſue: *Sed non allocatur*; for the Plaintiff having laid it to be falſe and malitious, and the Jury having found it to be *ſans tiel Cauſe*, it appears to be without any Ground; and therefore he is puniſhable. To the ſecond, That the Venue is well awarded; for there only was the Offence, which is only in Iſſue; wherefore the Trial was good; and it was adjudged for the Plaintiff. 2 *Cro.* 192. *Doggatte v. Lawry.*

Caſe for malicious Indictment of Felony. Exceptions to the Declaration for not laying *falſo*.

Upon a Verdict given for the Plaintiff in an Action upon the Caſe, brought for preferring a Bill of Indictment of Felony againſt him; it was moved in Arreſt of Judgment, that it was not laid in the Declaration to be done falſly, but that the Attorney of the Plaintiff, hath interlined the Word *Falſly* in the *Poſtea*. Secondly, It is not ſaid that the Indictment preferred, was delivered to the Grand Jury, but to the Court. *Rolle*, Chief Juſtice, It is ſaid to be preferred malitiouſly, and it cannot be malitiouſly, except it be alſo falſly;

falsly; and here is Falsly expressed in the Beginning of the Record, and it is not necessary to say so thro' the whole Record; for the Words subsequent are coupled to the precedent. And a Bill of Indictment is to be delivered to the Court, and the Grand Jury to receive it from thence. *Style* 274. *Kitchman's* Case.

Case in the Nature of a Conspiracy by Baron and Feme, for indicting them both of Feleny *ad damnum ipsorum*.

On Error of a Judgment in an Action upon the Case, in Nature of a Conspiracy; for causing them to be indicted of Felony falsly and malitiously, and to be detained in Prison, *Quousque*, they were acquitted, *ad damnum ipsorum*, *&c.* Upon Not Guilty pleaded, and Verdict found for the Plaintiff, Judgment being given for them, the Error assigned was, Because it was *ad Dampnum ipsorum*; for a Feme cannot join with her Husband for Damages; for it is a several Damages to either of them And of that Opinion was *Berkeley* upon the first Motion; for it is a several Wrong to either of them; and a Feme may not join for a Tort done unto her Husband. *Croke* held to the contrary, Because it is grounded upon one intire Record, by which they were both prejudiced, and they may join if they will: Or the Husband only may have the Action for it, that he was damnified; whereupon it was adjourned *cæteris absentibus*. 3 *Cro.* 553. *Dalby versus Dorthall* and his Wife.

Whether they may join.

Case in Nature of Conspiracy for procuring the Plaintiff to be indicted of Felony, of which he was acquitted.

On a Writ of Error; the Error assigned was, Whereas an Action upon the Case was brought in the Nature of a Conspiracy, That the Defendant *falso & malitiose* imposed upon him *crimen talis feloniæ*, and caused him to be arrested thereupon, and bound over to the Assises,

Assizes, and exhibited a Bill of Indictment against him of that Felony, and caused him to be indicted and detained in Prison, until he was *legitimo modo acquietatus*; and he doth not say (*Inde*) which is a principal Word, and the principal Cause of Damages. And it was said, That betwixt *Styles* and *Pricket*, for this Point, Judgment was reversed; and that in this Term, for this Default in the like Action, betwixt the same Parties, Judgment was given, *Quod querens nihil caperet per breve*; and this Judgment here in Question passed *sub silentio*. And the Court was of the same Opinion here. *Sed adjournatur*: But afterwards all the Judges held it good; and it was observed, that in the Old Book of Entries, *fol.* 123. the Word *Inde* is omitted. 3 *Cro.* 286. & 419. *Hitchman versus Porter.* *S. C. W. Jones* 367.

Exception to the Declaration, for not saying *Inde*.

No Action lies against a Juryman.

In an Action upon the Case; for that the Plaintiff is and was of good Name and Fame, and yet the Defendant's malitiously intending to cause the Plaintiff to be reputed a Common Barretor, the 27th of *November*, the 14 *Jac.* did falsly and malitiously procure the Plaintiff to be indicted in this Court, that he was a Common Barretor and a Disturber of the Peace of *Edmonton*, in the County of *Middlesex*, *ad communem disturbationem & inquietationem omnium in habitantium ibidem*; to which Indictment the Plaintiff, *die Jovis post oct ab. Hill.* 14 *Jac.* did plead Not Guilty; where Issue, &c. and the now Plaintiff was acquitted by Verdict, and Judgment to his Damage of 500 *l.* &c.

The Defendant pleaded, That at the Time of the Indictment, he and *William Smith* were impanelled in the Inquest for the said County, and

and then in this Court were ſworn to inquire upon their Oaths, of all Felonies, Treſpaſſes and Miſdemeanors, done within the ſaid County; and ſo being ſworn, having Evidence, upon Oath of good and loyal Men, given to the ſaid Defendant, and the reſt of his Fellow Jurors, the ſaid Defendant, and the other Jurors, there, and then upon their Oaths, on the Indictment mentioned in the Declaration, did indict the Plaintiff for the ſaid Offence mentioned in the ſaid Declaration, as they might very well do. And in this Caſe the Court gave Judgment for the Defendant; becauſe firſt, no Action lies againſt a Juryman. Secondly, The Indictment being vicious, no Action can lie. *Bridg.* 130. *Agard v. Wyld.*

Caſe in the Nature of Conſpiracy for indicting the Plaintiff of Felony, lies againſt one only.

In an Action on the Caſe in Nature of Conſpiracy; the Plaintiff declared, Whereas the Defendant, with *J. S. falſo & malitioſe* conſpired to procure him to be indicted of ſuch a Felony; that the Defendant *falſo & malitioſe*, ſuch a Day procured him to be indicted, whereby he was much vexed, *&c.* After Verdict, in Arreſt of Judgment *Littleton* moved, That this Action lies not, becauſe he did not ſue the other as well as the Defendant; for Conſpiracy ought to be againſt two; *ſed non allocatur*: For an Action upon the Caſe may well be againſt one of them; whereupon it was adjudged for the Plaintiff. 3 *Cro.* 239. *Mills v. Mills.*

Caſe for Words, and procuring him to be indicted of Felony.

In Caſe for Words, for calling him Thief, and for procuring him to be indicted and impriſoned for Felony until he was acquitted. Upon Not Guilty pleaded, and found for the Plaintiff, and ten Shillings Damages, (ſo under

Is not within the Statute of 21 J. 1. ch. 16.

der forty Shillings) it was moved upon the Statute of 21 Jac. ch. 16. (which appoints, that in Actions for Words, where the Damages are assessed under forty Shillings, that he shall have more Costs than Damages) That he should have but ten Shillings for Costs; but the Court conceived, forasmuch as this was not an Action for Words only, but also an Action on the Case in Nature of a Conspiracy, and the Defendant is found Guilty of both, he shall have Judgment for his ordinary Costs; and that it is out of the Statute. 3 Cro. 163. *Topsall v. Edwards.*

Case in the Nature of Conspiracy, for procuring the Plaintiff to be indicted of a Rape, of which he was acquitted. Plea, the Causes of Suspition.

An Action on the Case was brought, in Nature of a Conspiracy; for that he *falso & malitiose*, procured him to be indicted of the Ravishment of one *Mary Wirrall*, and to be detained in Prison for that Cause, until he was acquitted, to his Damages, *&c.* The Defendant pleads, That the said *Mary Wirrall*, being his Daughter, complained unto him that she was ravished by the Plaintiff: Whereupon he shewed it to Sir *Thomas Thynn*, Justice of the Peace in the same County, who convened the Plaintiff before him, and examined him. And upon his Examination, and Testimony of others, bound the Plaintiff to appear at the next Gaol-Delivery; and bound the Defendant to prefer his Bill of Indictment. Whereupon the Plaintiff appearing, he preferred his Bill of Indictment, which was found; and thereupon the Plaintiff was committed, and arraigned, and acquitted, which is the same Procurement of the Indictment and Acquittal whereof the Action was brought; and whereupon the Plaintiff demurred; and after Argument at the Bar, it was resolved that the Plea

And a Demurrer to it.

was

was good; First, It was agreed *per Curiam*, That the Declaration to procure one to be *falso & malitioſe* indicted, is good; for as Conſpiracy lies where two conſpire falſly to indict one, ſo an Action lies, where one, ſole, *falso & malitioſe* procures another to be indicted. Secondly, Altho' it was alledged, that the Plea was not good, becauſe it is not averred, that Felony was committed; and without a Fact, Suſpicion is no Cauſe of Arreſt; as 8 *Ed.* 4. 3. 5 *H.* 4. 25. *a multo fortiore* it is no Cauſe, without an Act done, to indict one; for he was too credulous to cauſe one to be indicted upon Complaint of ſo ſmall a Girl: And *Coke*, Juſtice, was of that Opinion: Yet all the other Juſtices held, That inaſmuch as the Father did it upon his Daughter's Complaint, to whom by Nature he is compaſſionate; altho' it had not been Cauſe of Arreſt for Suſpition of Felony (no Felony being committed) yet it is a good Excuſe of his Cauſe of Complaint to the Juſtice of the Peace, who binding over the one to appear, and the other to prefer Indictment, it is good Cauſe to excuſe him from the malitious procuring of the Indictment; which is the Ground of this Action: And all this Manner being confeſſed by Demurrer, the Court ſhall take it for a good Cauſe of Excuſe. But if it had been alledged that there was not any Raviſhment, and that the Defendant knew ſo much; it might peradventure have been otherwiſe. Wherefore it was adjudged for the Defendant. 2 *Cro.* 193. *Coxe v. Wirrall.* S. C. *Yelv.* 103. *Hutt.* 49. *Hurd v. Cordorey.*

But the Plea held good.

The Declaration is good, and the Action well lies.

Exception to the Plea for not averring the Girl was raviſhed.

Which *Coke* held to be fatal.

But the other Judges *contra.*

A Man

In the Declaration the Plaintiff muſt ſhew that the Indictment is determined, and how.

A Man brought an Action upon the Caſe againſt another, becauſe he cauſed him to be indicted and arraigned, *&c.* to his Damage, *&c.* and it was for a Robbery; and the Plaintiff did not ſhew in his Declaration that he was *legitimo modo acquietatus*; the Defendant by way of Bar, ſaid that he was not acquitted *modo & forma*, as the Plaintiff had ſaid; and in truth, he does not ſay he was acquitted. *Coke*, If the Declaration be inſufficient, and wanteth Subſtance, then there is no Cauſe of Action. *Clench*, Juſtice, A Man ſhall not have an Action without Cauſe; and if he were convicted, then there is no Cauſe of Action, and he hath not ſhewed whether he were convicted or acquitted; and he ſaid, that there were no Difference between an Action on the Caſe, and a Conſpiracy in ſuch Caſe, but only this, That a Conſpiracy ought to be by two, at the leaſt, and an Action upon the Caſe may lie againſt one; and he ſaid, That in both he ought to ſhew that he was *legitimo modo acquietatus*. See 11 *H.* 7. 25. An Action of Conſpiracy founded upon the Statute of 8 *H.* 6. *ch.* 10. where it is grounded upon a Writ of Treſpaſs brought by one only; but ſuch a Conſpiracy which is grounded upon an Indictment of Felony, muſt be againſt two at the leaſt; for the ſame is an Action founded upon the Common Law. *Godb.* 76. *Shotbolt's* Caſe.

Caſe for Indictment of Felony after Acquittal.

A Writ of Error was brought on a Judgment in the King's Bench, in an Action upon the Caſe; where the Plaintiff declared, Whereas he was *Bonus honeſtus, &c.* That the Defendant *falſo & malitioſe* procured him, at ſuch a Seſſions of the Peace, before ſuch Juſtices

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MVSEVM
BRITANNICVM

Juſtices of the Peace to be indicted of Felony, for ſtealing a Piece of Timber from the Plaintiff. *Et ea occaſione capi, & apud Norwich* to be impriſoned, until *coram J. B. & A. S. Juſticiariis pacis & ad audiendum, &c. legitime acquietatus fuit ad dammum, &c.* The Defendant pleads he was poſſeſſed of a Piece of Timber, which was feloniouſly ſtolen from him by Perſons unknown, which was found in the Plaintiff's Poſſeſſion; whereof he complained to Serjeant *Houghton*, being a Juſtice of Peace; who examining the Plaintiff, and finding Cauſe of Suſpicion in him, that he had ſtol'n it, committed the Plaintiff to Priſon, and bound the Defendant in a Recognizance to proſecute againſt the Plaintiff; for which Cauſes he exhibited a Bill of Indictment thereof, and the Plaintiff was indicted; which is the ſame Conſpiracy. The Plaintiff replies, *de injuria ſua propria abſque tali cauſa*; and Iſſue joined thereupon, and found for the Plaintiff, and Judgment accordingly. The Error aſſigned was, Becauſe the Plea in Bar is ill, and no Bar to the Action; and ſo the Iſſue joined is not material; and then the Judgment thereupon is erroneous: *Sed non allocatur*; for the Plea in Bar is good; for it is a good Juſtification of his Dealing, if it were true; as 8 *H.* 4. 6. and 31 *Eliz.* betwixt *Knight* and *Jerome* in the King's Bench, it was held, That ſuch a Juſtification was good. Another Error which was aſſigned, *ore tenus*, was, That the Declaration was not good, becauſe it is that he was *legitime acquietatus*; and doth not ſay, *Inde de Felonia prædicta*; ſo that it does not appear whereof he was acquitted; and Conſpiracy lies not, unleſs he ſhews that he was lawfully acquitted

Plea, ſhewing what Cauſe he had to ſuſpect the Plaintiff.

Replication, *de injuria ſua propria.*

Exception to the Declaration for not ſaying *inde acquietatus.*

of the Felony aforesaid. And therefore *Fitz. N. B.* 114. and the Precedents in the Books of *Entries*, are, *Quod legitimo modo inde acquietatus existet; sed non allocatur*; for true it is, so it ought to be in Conspiracy, as all the Court agreed: But this Action being but an Action upon the Case, and for that he *falso & malitiose* procured him to be indicted, and caused his Name to be called in Question, and procured him to be imprisoned; and for that he had done it *falso & malitiose*; for this Cause the Action was brought; and *Tanfield* said he well knew this Difference to be so agreed in the Case of *Knight* and *Jerome* in this Court, after long Debate and Advisement: Wherefore the Judgment was affirmed. 2 *Cro.* 130. *Marham v. Pescod. S. C. Noy* 116.

So it ought to be in a Writ of Conspiracy. Otherwise in an Action on the Case.

Action on the Case in Nature of a Conspiracy was brought; for that the Defendant *falso & malitiose* procured him to be indicted at the Sessions of Peace in the County of *Middlesex*, of Felony for stealing a Cloak, and other Goods, *&c.* and to be imprisoned, until he were acquitted, *&c.* The Defendant pleaded, That he was possessed of the Goods mentioned in the Indictment; and that they were stolen from him by Persons unknown, out of his House in *High-Holborn*, in the County of *Middlesex*, whereupon he made Search for them, and found them in the Plaintiff's House, and demanded of him how he came by them; he for the Examination thereof, complained to *J. S.* Recorder of *London*, and Justice of Peace in *London* and *Middlesex*, and obtained his Warrant to bring the Plaintiff before him to be examined concerning those Goods, by Virtue whereof he was brought before him, and

In the Nature of Conspiracy for malicious Indictment of Felony, of which he was acquitted.

Plea, setting forth the Causes the Defendant had to suspect the Plaintiff.

and examined, *&c.* and becauſe he gave various and uncertain Anſwers, the ſaid *J. S.* greatly ſuſpected him of the ſaid Felony. Whereupon he bound the Plaintiff in a Recognizance of 40 *l.* to appear at the next Gaol-Delivery of *Newgate*, and bound the Defendant in a Recognizance of 40 *l.* to proſecute and give Evidence againſt the Plaintiff concerning the ſaid Felony: Whereupon he at the next Seſſions for the County of *Middleſex*, preferred the ſaid Bill of Indictment; *prout* in the Declaration, *&c.* and delivered to the Jury upon his Oath all the ſaid Circumſtances; whereupon they found the Bill, for which the Plaintiff, at the next Gaol-Delivery of *Newgate*, was committed to Priſon, *prout*, *&c.* in the Declaration, and there acquitted, no Evidence being given againſt him, *Quæ ſunt eadem Indictament. procuration. & in priſona detentio, unde ſe queritur, & hoc, &c.* And hereupon the Plaintiff demurred. And now this Term it was argued by *Bacon*, for the Plaintiff, That this Plea is not good; becauſe it is not alledged that the Plaintiff ſtole them; nor doth he ſhew any ſufficient Cauſe of Suſpicion, as Common Fame, or that he was taken with the Manner, or the like; and altho' he gave Evidence upon his Oath, that ſhall not excuſe him. It is alſo alledged in the Declaration, That he *falſo & malitioſe* exhibited the Bill, which he ought to have traverſed: But all the Court reſolved, That the Plea was good, and need not any Traverſe; for when he ſhews that the Goods were ſtolen, and found in the Houſe of the Plaintiff, and he would not ſhew by what lawful Means he came by them, that made a good Cauſe of Suſpicion;

Demurrer to the Plea,

Exception to it for want of a Traverſe,

But held good.

and when he was examined thereof before a Juſtice of the Peace, and gave various and uncerrain Anſwers, that aggravated the Suſpicion, and was juſt Cauſe of binding him over to the Seſſions. And when the Party is bound by Recognizance to give Evidence, and he exhibits his Bill, and gives Evidence, that is a good Cauſe of Juſtification; for otherwiſe every one who exhibits a Bill of Indictment, and gives Evidence againſt a Priſoner, ſhall be drawn in Queſtion for a Conſpiracy. That the Allegation in the Declaration, that he *falſo & malitioſe* procured him to be indicted is not traverſable, when he alledges the Special Matter of procuring the Indictment, which the Plaintiff hath confeſſed by his Demurrer, which, if it were falſe, the Plaintiff might well have traverſed it. Wherefore, without further Argument, it was adjudged for the Defendant. *Vide* 27 *Aſſ.* 12. 8 *H.* 4. 6. *Fitzh. Conſpiracy*, 7. 27 *H.* 8. 2. and *Pain's* Caſe, *ante Hill.* 44 *Blac.* 7. 1 *Cro.* 900. *Chambers ver. Taylor.*

A *Falſo & malitioſe* in the Declaration is not traverſable.

In a Writ of Error upon a Judgment in an Action upon the Caſe, two Errors were aſſigned. Firſt Error, For that in the ſaid Action the then Plaintiff declared, That whereas he was of good Name and Fame, the now Defendant intending to detract from his Name and Fame, and put his Life in Jeopardy, did maliciouſly cauſe a Bill of Indictment of Felony to be written, and the ſame being ſo written, at ſuch a Seſſions of the Peace, at *Newgate*, exhibited the ſame to the Grand Jury, *Et falſo depoſuit omnia in ea contenta fore vera.* Whereupon he was indicted of the ſame Felony, and after arraigned, and found not Guilty,

Caſe for Indictment of Felony, of which the Plaintiff was acquitted.

Guilty, and thereupon brought the Action; and upon not Guilty pleaded found for him; for which he had Judgment to recover ſeventy two Pounds for Damages and Coſts, *ubi revera* upon this Matter ſhewn no Action does lie. 2. Error, That the Exigent upon the Judgment ſuppoſeth only ſeventy two Pounds was for the Recovery, and not more. As to the firſt Matter the Court was in Doubt. But *Wray* ſaid, That this Indictment being written and preferred malitiouſly, is not Reaſon, but an Action ſhould lie to puniſh it. And if two conſpire malitiouſly to exhibit an Indictment, and the Party be acquitted, he ſhall have a Conſpiracy; ſo when one doth it, this Action upon the Caſe lieth.

But *Shute* and *Gawdy*, *contra*, That the Action doth not lie: for then every Felon that is acquitted will ſue an Action againſt the Party; but for the ſecond Error, they held clearly it was well aſſigned; for that then was no ſuch Judgment for Seventy; and tho' it was the Default of the Clerk, yet it cannot be amended to make the Outlawry good. And it being moved at another Day, the Opinion of all the Court was, That the Action lieth not when the Indictment is preferred by the Party grieved, and he purſueth it according to the Law; and the Statute of *Weſt. c.* 2. which does gives Damages where the Party is acquitted, doth prove this; and this Caſe remaineth at Common Law. *Vide* 27 *H.* 8. 27 *Aſſ.* 12. and 7 *H.* 6. 14. And the Plaintiff had Judgment. 1 *Cro.* 70. & 134. *Knight v. German. S. C.* 1 *Leon.* 107. 9 *Coke* 55. The *Poulterer's* Caſe. No Action lies.

What Conſpiracies are puniſhable by Law.

Every Conſpiracy which the Law will puniſh, before 'tis reduced to act, muſt have theſe four Qualities. 1. There muſt be ſome Act done towards the Execution thereof; and Promiſes or Agreements are ſufficient. 2. It muſt be malitious, and out of Revenge. 3. It muſt be againſt an innocent Perſon. 4. It muſt be out of a Court, and voluntary. 9 *Coke* 55. The *Poulterer's* Caſe.

Caſe lies for malicious Indictment on which the Grand Jury found an *Ignoramus*.

Error was brought of a Judgment in an Action upon the Caſe; for that the Plaintiff *falſo & malitioſe* impoſed upon him *crimen feloniæ*, ſuppoſing he had robbed him *& falſo & malitioſe* exhibited againſt him a Bill of Indictment, ſuppoſing that ſuch a Day and Year he robbed him; and exhibited it to the Grand Jury, in the County of *Nottingham*, and affirmed the Matter in this Bill to be true; *ubi revera* it was falſe, and that the Jury found an *Ignoramus* thereupon, whereby he was forced to great Coſts and Charges, for the Defence of his good Name and Fame. The Defendant juſtifies; and Judgment for the Plaintiff in the King's Bench, without Exception. And a Writ of Error was brought, and aſſigned for Error, That this exhibiting a Bill of Indictment is no Cauſe of Action. But all the Juſtices of the Common Bench, and Barons of the Exchequer, agreed, That the Action lies; for altho' the exhibiting a Bill upon true and juſt Preſumptions, be excuſable, and no Action lies; yet when it is alledged, That he *falſo & malitioſe*, without any ſuch Cauſe, had accuſed him of Felony; and exhibiting this Bill *falſo & malitioſe*, that is a great Cauſe of Slander and Diſgrace, and juſt Ground of Action for the Plaintiff: And the Defendant having made his Juſtification, and

and all his Cauſes of Juſtification found to be falſe, it is good Reaſon the Action ſhould lie; wherefore the Judgment was affirmed. 2 *Cro.* 490. *Payn ver. Porter.* See *Winch* 29, & 54. *Wright v. Blackwell.* Debated whether an Action would lie in ſuch a Caſe.

Caſe for malicious indicting one of Felony on an *Ignoramus* found.

A Man brought an Action of the Caſe againſt one for cauſing him to be indicted for ſtealing of a Mare, and had a Verdict againſt the Defendant. It was moved in Arreſt of Judgment, That upon preferring of the Bill to the Grand Jury, they found an *Ignoramus*; and ſo there is a Repugnance in the Declaration, which ſets forth that the Plaintiff cauſed him to be indicted; and yet ſays, That an *Ignoramus* was found; ſo that upon the Matter it was found no Indictment. *Wylde*, on the other ſide, ſaid, The Declaration is well enough; and there is no Repugnancy; for the Words ſhall be taken according to the Common Conſtruction. *Hale*, There is another Exception, *viz.* That all the Proceedings mentioned in the Declaration are expreſſed to be before the Judges, as Commiſſioners for the Gaol-Delivery, and not as Commiſſioners of *Oyer* and *Terminer*. *Rolle*, Chief Juſtice, We will intend that the Indictment was before them as Juſtices of *Oyer* and *Terminer*; and in Truth it is not material before what Authority he was indicted; and in this Caſe the Trouble the Party is put unto by Reaſon of this Indictment, is the Cauſe of his bringing this Action, and not his Trial upon it; and therefore the Authority is not material; nor is it material, whether the Indictment be good or not; and the Words here are to be conſtrued according to the Common

Repugnancy in the Declaration.

And not ſaid before the Juſtices of *Oyer* and *Terminer*.

Intendment. *viz.* That he was indicted tho' the Indictment was not found, but an *Ignoramus*; and ſo by Conſequence in Law it is no Indictment, upon which he could be tried to come in Danger of his Life. *Hale* moved, That they might amend the Declaration, and go to a new Trial. *Rolle*, Chief Juſtice, It would be good to be ſo; for it is doubtful how we ſhall take the Matter as it ſtands before us upon the Record. *Style* 372. *Yelv.* 116. *Arundell v. Tregono.*

No Action lies till the Indictment is determined.

It muſt appear on the Declaration what became of the Indictment; for until it is determined no Action will lie. *Yelv.* 116. *Arundell v. Tregono.*

Where the Venue to be.

That Place ſhall be laid in the Declaration, where the falſe Oath was taken; and by the 4th of the Queen, by which all Venues muſt be *de Corpore Comitatus*, the Jury ſhould come from thence. 3 *Bulſt.* 331.

Caſe for maliciouſly preferring a Bill of Indictment of Felony which the Grand Jury found *Ignoramus*.

One brought an Action upon the Caſe againſt *J. S.* for preferring a Bill of Indictment againſt him, for ſtealing of a Mare, and that the Grand Jury found an *Ignoramus*, whereby he was diſcharged: The Plaintiff obtains a Verdict againſt the Defendant; the Defendant takes theſe Exceptions to the Declaration in Arreſt of Judgment. Firſt, That it doth not appear thereby, that the Party who preferred the Bill of Indictment gave any Evidence to the Grand Jury touching the Bill. Secondly, It appears not that the Plaintiff was bound over to anſwer the Felony, and conſequently he was not moleſted by it; and ſo he can have no Action: But the Court ſtaid the Judgment to another Day upon the Exceptions taken, and ſaid an Action upon the Caſe lies

for

for procuring one to be indicted, altho' the Party himſelf do it not; and that one may exhibit a Bill of Indictment to a Grand Jury without Oath, and they may notwithſtanding find the Bill, and altho' it be exhibted upon Oath, they are not bound to find it, if they ſee cauſe to the contrary; and that in the Caſe at the Bar, the Action might be as well grounded upon the Scandal, which grew to the Party who was indicted, as upon the Trouble which might have befallen him by Reaſon of preferring the Bill againſt him. *Style*, 10.

In an Action upon the Caſe for a Conſpiracy, to indite him of Felony; and that *falſo & malitioſe crimen Feloniæ* he laid to his Charge, for the ſuppoſed ſtealing of five Steers; upon this he was tried and acquitted. What is a good ſuſpecting one of Felony.

The Defendant pleads in Bar, and ſhews, That eighteen *Novemb.* at *Birmingham*, he was poſſeſſed of five Steers, which were ſtolen from him; that he made freſh Suit after them; that they were found in the Poſſeſſion of the Plaintiff; that he came to him, and demanded to have the Sight of them, which he refuſed to do, and gave him very uncertain Anſwers, by Reaſon whereof he did ſuſpect him, and ſo procured a Warrant, and had him before Sir *Thomas Bennet* to be examined; and for his uncertain Anſwers upon his Examination, he did alſo ſuſpect him, and committed him, binding him over to appear at the next Seſſions to anſwer this Matter; and did then alſo bind this Defendant to proſecute againſt him. At which Time he did accordingly proſecute an Indictment againſt him, and then gave this Matter in Evidence to the Jury againſt him,

him, who did acquit him; and ſo juſtifies his Proceedings.

The Plaintiff replies, and ſhews, That he was a Butcher, and bought theſe Steers in Market-Overt, and had tolled for them; and that he had killed three of them; and takes a Traverſe *abſque hoc* that he refuſed to ſhew them to him: Upon this Replication, the Defendant demurs in Law, ſuppoſing the Traverſe to be too ſhort; ſo that he hath not anſwered all which is laid againſt him.

Of the Traverſe in the Replication, whether good.

Montague, Chief Juſtice, As Men muſt not be diſcouraged to proſecute Felonies, ſo they are not to be animated for to vex the Innocent; here the Action brought, *quia A. ſciens* that he had bought them, yet procured him to be indicted.

Doderidge, Juſtice, Here is a Bar, and a Replication *de injuria ſua propria abſque tali Cauſa*; this could not ſo have been in this Caſe, for this had been a Traverſe to all other Matters before alledged; here is good Ground of Suſpicion.

The Traverſe here being *abſque hoc*, that he refuſed to ſhew him the Cattle; this is a good Traverſe, and an Iſſue might have been taken upon it; but by ſuch a Traverſe as *de injuria ſua propria abſque tali Cauſa*, by this the Plaintiff would have been tried, becauſe that Part of the Bar is good. The Traverſe here, as it is taken, is good, and no Cauſe of Demurrer, *propter varias & incertas reſponſiones*; this is a good Cauſe of Suſpicion, but is not traverſable.

Houghton,

Houghton, Juſtice, It is here ſet forth in the Plea in Bar, That he refuſed to ſhew him the Oxen, being demanded ſo to do. This was a manifeſt Cauſe of Suſpicion, and well traverſable; but *proper varias & incertas reſponſiones*; this is only ſet down for Aggravation, and like unto *alia enormia*.

Dodderidge. If the Bar be good, then the Defendant ought to conclude with a Traverſe, *ſc. abſque hoc* that he did exhibit a malicious Indictment.

Houghton, The Suſpicion of the Juſtice of Peace here is not at all material.

Dodderidge agreed with him herein; if he refuſed to ſhew him the Cattle, this was a good Cauſe of Suſpicion; and this was a good Ground for him to bring him before a Juſtice of the Peace to be examined, the Suſpicion of another Man is not to be traverſed.

In this Caſe the Court ſeemed to be of Opinion againſt the Defendant, that the Traverſe was well taken by the Plaintiff, and the Defendant had no Cauſe of Demurrer; and ſo this Caſe was adjourned to another Time, for the Court to be further ſatisfied herein; but the ſame was never moved again, but ended between the Parties as was reported; they receiving the Opinion of the Court which way it was. 3 *Bulſt*. 284. *Weale verſus Wells*. *Vid. T. Jones* 20. *Paulin v. Shaw*, where Judgment was ſtaid; and 'twas reſolved, that no Action lay; but that Caſe don't ſeem to be Law.

In Caſe for malicious indicting and proſecuting the Wife for Felony, whereof ſhe was acquitted: Declaration recited the Indictment *continent. materiam ſequentem*; and in the Recital

How to recite the Indictment in the Declaration.

cital of the Goods ſuppoſed to be ſold, it was *Valoris* of ſo much; whereas the Indictment was *Valentiæ* of ſo much: And it was objected, That this was a Variance from the Indictment, but over-ruled, for that was the ſame in Subſtance, and ſo *materiam ſequentem*; but if they had undertaken to ſet forth the Indictment in *hæc verba*, it would have been a fatal Exception.

Of the Evidence.

Nota per Holt, Chief Juſtice, To do the Buſineſs fully, the Plaintiff ought to have a proved Copy of the Bill exhibited, and that it was found upon the Oath or Procurement of the Defendant; but their Names upon the Back of the Bill is ſufficient Evidence of their being ſworn to the Bill, tho' the Writing upon the Back is no Part of the Record: But it may be proved that the Defendant was a Witneſs without having the Bill; but it were, I ſay, more clear to have the Bill: And the firſt Part of the Defendant's Defence in this Caſe, muſt be to prove a Felony committed; for without that it is impoſſible he ſhould have a probable Cauſe of Proſecution; and here, becauſe no Body was by at the Time of the ſuppoſed Felony committed, but the Defendant's Wife, who could not in this Cauſe be Witneſs to prove the Felony committed, *Holt*, Chief Juſtice, allowed her Oath, which ſhe made at the Trial of the Indictment to be given in Evidence to prove a Felony committed; for otherwiſe, one that ſhould be robbed, *&c.* would be under an intollerable Miſchief; for if he proſecuted for ſuch Robbery, *&c.* the Party would at that Rate be acquitted, and the Proſecutor be liable to an Action for malicious Proſecution without a Poſſibility of making a good

good Defence, tho' the Cauſe of Proſecution were never ſo pregnant.

To which *Darnell* for the Plaintiff ſaid, If Oath had been made freſhly after the Fact committed, that Oath might be admitted as Evidence of it, *ſecus* not; but here it appeared a Warrant was taken out immediately, but nothing done thereupon till the Defendant had ſubſequent falling-out with the Plaintiff. *Mod. C.* 216. *Johnſon & Ux' ver. Browning.*

In the Record in the Declaration, one of Jury's Name was *Lanceſter*, in that produced at the Trial 'twas *Lancaſter*; yet 'twas good, and no Variance. *Aleyn.* 91. *Lanceſter* and *Lancaſter*, is no Variance.

Caſe for a falſe and malicious Indictment of Barretry, whereof he was *legitimo modo acquietatus*; and upon the Trial it appeared, he was acquitted no otherwiſe than by Entry of a *Nolle proſequi*; and whether this was ſufficient to maintain the Action, was made a Point of the Opinion for the Court: And the Court held, this Evidence did not ſupport the Declaration; for the *Nolle proſequi* is a Diſcharge to the Indictment, but is no Acquittal of the Crime; and the Chief Juſtice doubted as to the latter Matter, and was of Opinion, that the Crown, notwithſtanding the *Nolle proſequi*, might award new Proceſs upon the ſame Indictment. 1 *Salk* 21. *Goddard v. Smith. S. C. Mod. C.* 261. Caſe don't lie on a diſcharge by *Nolle proſequi*, and why.

In a Declaration for malicious Indictment on which the Jury found an *Ignoramus*; to declare *quod juratores præd. dixerunt quod ignorabant*, or *quod fuerunt ignorantes* is a good Form of declaring. *T. Jones* 20. *Paulin v. Shaw.* How to declare where the Jury find an *Ignoramus*.

Error

Case in the Nature of Conspiracy for causing the Plaintiff to be indicted of Perjury.

Error was brought of a Judgment in the Common Bench, in an Action upon the Case in Nature of a Conspiracy, where the Plaintiff declared, That the Defendant (the now Plaintiff) *falso & malitiose* caused such an Indictment of Perjury to be written *hanc falsam materiam, &c.* (reciting it *verbatim*) and exhibited it to the Grand Jury before the Justices of Peace at *Westminster*, and procured it to be found. And that afterwards Sir *Edward Spencer*, one of the Justices of the Peace of *Middlesex*, before whom, *&c.* delivered it with his own Hands to the Justices of Goal-Delivery, and of *Oyer* and *Terminer* at *Newgate*, for the City of *London* and the County of *Middlesex*, whereby he was brought to the Bar under the Sheriff's Custody, and arraigned and acquitted. And hereupon Judgment being given in the Common Bench for the Plaintiff, the Defendant brings a Writ of Error. And was moved, That the Declaration was not good; first, Because it is by way of Recital of the Indictment only; and for this the Case of *Browning* and *Beeston*, *Plow.* 136. was relied, *sed non allocatur*; for it is *scribi fecit talem falsam materiam*, which is a direct Affirmative. The second Exception was, Because he doth not shew that he was in the Gaol; and then the Justices of the Gaol-Delivery have no Power to meddle with him; *sed non allocatur*; for *ductus ad Barram & sub custodia*, shews him to be in Gaol. 3 *Cro.* 553. *Bagnall versus Knight.* *Pal* 44. 1 *Vent.* 47.

1st Exception to the Declaration, because only by way of Recital. Overuled.

2d. Because not averr'd he was in Goal. Over-ruled.

Case in Nature of a Conspiracy for procuring him to be indicted of Perjury, of which he was acquitted.

An Action upon the Case, in Nature of a Conspiracy, for procuring him to be indicted for Perjury; *pro eo quod* in an Action of Debt in *London* betwixt one *Johns* and the Defendant, and recites the Action, and Issue (but the

the Action in *London* was an Action on the Caſe) the ſaid Plaintiff was produced as a Witneſs, and ſwore falſly, and ſhews his Oath; but ſhewed not that he was *coram Judice*, nor that it was *coram Jurator. &c.* The Defendant pleaded, That he was an illiterate Man, and delivered all the Pleadings in *London* to the Clerk to draw the Indictment, who drew it, and therein miſtook the Plaint in *London*, alledging it to be an Action of Debt, whereas it was an Action on the Caſe, and delivered it to the Defendant, and read it unto him, as truly drawn, and he, believing the ſame, delivered it to the Grand Jury, and took his Oath, *Quod Billa fuit vera.* And becauſe it was falſe, by Reaſon of this Miſpriſion, the Plaintiff was found Not Guilty; and thereupon the Plaintiff demurred, and the Bar was held to be ill. But, notwithſtanding it was adjudged againſt the Plaintiff, that the Declaration was not good, becauſe he doth not ſhew that the Oath was taken before ſome Judge; and then the Indictment was vitious, and an Action lay not; for this Action is not maintainable, but where a Conſpiracy lies upon a Conſpiracy between two. *Secondly*, They held that this Action lies not againſt any who prefers an Indictment, and ſwears it to be true; for it is for the Queen, and the Commonwealth; and if it ſhould be allowed, no Indictment would be preferred. So one ſhall not be puniſhed for preferring a Bill in the Star-Chamber by an Action upon the Caſe, altho' the Matter be falſe, and contains great Slander; as it was ruled in the Earl of *Lincol*'s Caſe. The Indictment was not ſufficient by Reaſon of this Miſpriſion of the Action.

Plea, that he was illiterate; and that the Plaintiff in in the Action was acquitted by miſtake in the Indictment.

And held ill.

And the Declaration held ill for not ſhewing the Oath was taken before ſome Judge.

No Action lies for preferring an Indictment.

So

Especially where the Party is acquitted by an Error in it.

So as the Defendant might have pleaded *Nul tiel Record*; and he needed not to have said Not Guilty; so he never was *legitimo modo acquietatus*, any Perjury supposed. Wherefore it was adjudged for the Defendant. 1 *Cro.* 724. *Sherington v. Ward.*

Case lies for malicious Indictment of Felony, tho' the Charge in the Indictment be in truth but a Trespass.

Follye brought an Action upon the Case against *Gardiner*, for causing him to be indicted for Felony, as Accessary for suffering a Prisoner to escape that was convicted; the Plaintiff had a Verdict, and a Judgment. The Defendant brought this Writ of Error to reverse this Judgment; and the Error assigned was, That the Party was indicted for a Matter which is but a Trespass, and not a Felony; and so the Declaration is mistaken, and an Action on the Case lies not. But the Court answered, That the Charge of the Indictment is for Felony; altho' the Matter the Party is charged with be not Felony, and a Scandal lay upon him by it, and therefore the Action lies. *Style* 157. *Gardner* against *Follye.*

What Suspicion is good Cause to indict one.

If a Man indict another upon Probabilities, and relies only upon them, and the Party indicted be acquitted, he shall not have for this an Action upon the Case for a Conspiracy. a Man is to ground his Indictment, and his Prosecution thereupon, upon his own Suspicion; and this his Suspicion ought also to be grounded upon other Probabilities; and this ought to be his own Suspicion, and not the Suspicion of others, otherwise his Justification will not be good; and herein he hath failed in this Case, grounding his Proceedings, and his Justification thereby upon the Suspicion of those three other Persons, which he saith were present with him, when the Letter was

delivered to him; and that they ſaid, That they did ſee the Party again, and heard him ſpeak, and conceived him in all Likelyhood to be the ſame Party, and upon this their Suſpicion, he complained of him, and proſecuted againſt him, and the Jury did acquit him; ſo that here was nothing at all grounded upon his own Suſpicion, and ſo his Juſtification not good; and the Plaintiff for this had juſt Cauſe of Action. 1 *Bul.* 149. *Wale* againſt *Hill.*

Action for maliciouſly cauſing him to be indicted of a Riot after Acquittal by Verdict.

In an Action on the Caſe the Plaintiff declared, *Quod Defendens falſo & malitioſe abſque aliqua probabili cauſa ipſum indictari cauſavit de rioto, cui indictamento ipſe placitabat non culp. & fuit inde per veredict. Juratorum acquietatus; per quod magnas denariorum ſummas & multos labores expendere & ſubire coactus fuit.* Upon *Non Culp'* the Plaintiff had a Verdict and Judgment in the *C. B.* which was now affirmed in *B. R.* It was objected, That this would diſcourage Proſecutions; and at this Rate the Proſecutor, whenever he is in the Wrong, or miſcarries, will be ſubject to an Action. *Et per Cur.*

Amerciaments *pro falſo clamore* were aſſeered by Jury upon Warrants to the Coroners.

A Civil Action differs very much from an Indictment; for in that the Defendant hath his Coſts. And at Common Law the Plaintiff was amerced *pro falſo clamore*, for the Eſtreats of which Amerciaments Warrants were conſtantly delivered to the Coroners, who by a Jury aſſeered them according to the Malice or Vexation of the Plaintiff. Alſo in Civil Actions the Plaintiff aſſerts a Right, or complains of an Injury; and therefore the Court held, That to ſay, *A. is a Baſtard, and I am the Heir*, is not actionable, becauſe he is a Party concerned, and aſſerts a Right. *Aliter*,

Bringing an Action not actionable, tho' nothing due, without some special collateral Act of Wrong which must be expressly shewn.

if he had not added, *and I am the Heir. Vide* 4 *Co.* 80. So to bring an Action, tho' there be no good Ground, is not actionable, because it is a Claim of Right, and he has found Pledges, and is amerceable *pro falso clamore*, and is liable to Costs: But yet if one has a Cause of Action to a small Sum, and take out a *Latitat* to a very great Sum; or has no Cause of Action at all, and yet maliciously sues the Plaintiff to the Intent to imprison him for want of Bail, or to do him some special Prejudice, an Action on the Case lies; but then 'tis not enough to declare generally, that he brought an Action against him *ex malitia & sine causa*; *per quod* he put him to great Charge, *&c.* but he must shew the Grievance specially; as in 1 *Sid.* 424. So whereas he owed him, the Defendant, 100 *l.* he sued him for 500 *l.* and to hinder him from Bail, affirmed to the Sheriff 500 *l.* was due, *per quod*, he was imprisoned for want of Bail; or 1 *Saund.* 228. for that the Defendant intending to procure his Imprisonment, where there was no Cause of Action, or without any Cause of Action, sued him in an Action of 300 *l.* whereupon he was arrested and imprisoned, *&c.* and yet if one that is not concerned, as a Stranger, procure another to sue me causelessly, I may maintain an Action against him generally. *Vide N. B.* 96. *M.* 2 *Inst.* 544. 3 *Cro.* 378.

If one not concerned, procure *A.* to sue *B.* without Cause, *A.* may have Action against him.

Action will lie. 1. for maliciously causing *H.* to be indicted, whereby he is Indemnified either. 1. In Person, as by Imprisonment. 2. In Reputation, as by Scandal. 3. In Property, as by Expence. In the two first Cases, tho' Indictment be insufficient, or *Ignoramus* returned, but not in the last.

If a Man be falsly and maliciously indicted of any Crime that may prejudice his Fame and

Re-

Reputation, he may bring his Action: For he is falſly ſcandalized by the Malice of the Proſecutor, which is a Damage for which the Law gives an Action. 1 *Sid.* 46. *Telv.* 15. *Lutw.* 122. So if a Man be falſly and maliciouſly indicted of any Crime that ſubjects him to Peril of Life or Liberty, and for which he may be puniſhed, he may bring his Action; for he is indangered in this Reſpect, and receives a Damage, for which the Law gives an Action. So if a Man be falſly and maliciouſly indicted, tho' it neither touch his Fame nor Liberty; for it is injurious to his Property, in putting him to a needleſs Expence; and a Damage to one's Property will maintain an Action as well as a Damage to his Fame or Perſon. *Vide* 3 *E.* 3. 19. 3 *Aſſ.* 1. 7 *H.* 4. 31. 11 *H.* 7. 25, 26. *N. B.* 106. *Style* 379.

3. Where a Man is falſly and maliciouſly indicted of a Crime which hurts his Fame, and which is a Scandal to him, tho' the Indictment be inſufficient, or an *Ignoramus* found, yet an Action lies for the Slander, becauſe the Miſchief of that is effected. So it is if it indangered his Liberty, and he was actually impriſoned. Otherwiſe where it only concerns his Property; for he cannot ſuffer in that in either of theſe Caſes. But tho' the Action lie, yet it is not to be favoured; and therefore, 1ſt, If the Indictment be found by the Grand Jury, the Defendant ſhall not be obliged to ſhew a probable Cauſe; but it ſhall lie on the Plaintiff's Side to prove an expreſs Rancor and Malice. 2ndly, If *Ignoramus* be returned, where the Indictment contains no Scandal, or the Party has not been impriſoned, no Action lies; otherwiſe, if it

contains Scandal, or the Party hath been imprisoned; but then there must be Evidence of express Rancor and Malice; for Innocence is not sufficient. Judgment affirmed. 1 *Salk.* 13. *Savill v. Roberts.* S. C. 5 *Mod.* 394, 395. So on an Indictment for a Rescue, no Action lies *Sid* 261. *Lowe v. Beardmore.* S. C. *Raym.* 185. S C. 1 *Lev.* 169. *Style* 424.

But the Publisher of *Salkeld's Reports*, in the Margin of the Report of the aforesaid Case, says, That in an Action on the Case for maliciously procuring *H.* to be indicted for exercising the Trade of a Badger without Licence, *per quod* he was put to great Expence, (in which it was agreed that the Indictment was insufficient.) It was resolved by *Parker*, Chief Justice, and the whole Court, upon great Consideration, That there was no Reason for this Diversity, between a malicious Prosecution upon a good Indictment, and upon a bad one; and that this Action will lie as well for Damage by Expence, as by Scandal or Imprisonment, tho' the Indictment be insufficient. *Hill.* 12 *Annæ B. R. Jones v. Gwynn. Intr. Trin.* 11 *Annæ*, 326. And with this Opinion agrees, 2 *Mod.* 51. & 306. and *Foresl.* 104. *Style* 424.

Case for procuring the Plaintiff to be indicted of Barretry of which he was acquitted.

An Action on the Case was brought against *Francis Throgmorton*, because he procured the Plaintiff to be indicted as a Common Barretor before the Justices of the Peace in the County of *Warwick*; and that afterwards he was lawfully acquitted thereof, before *Anderson* and *Clinch*, Justices, Justices of the Assize there. The Defendant pleaded Not guilty, and found against him; and it was alledged in Arrest of Judgment, That the Declaration was not good;

good: For he has ſhewn, That he was acquitted before *A.* and *C.* Juſtices of Aſſiſe, which is not good; for he cannot be acquitted before them as Juſtices of Aſſize, but as Juſtices of *Oyer* and *Terminer*; and it was held to be an apparent Fault by the whole Court. *Anderſon* and *Beaumont* held, That the Action lies not for the Matter; for when one preferrs an Indictment, and is ſworn thereupon; it is to be intended, that he prefers it lawfully, and in Zeal of Juſtice. And altho' the other be found Not guilty, it is not Reaſon he ſhould be puniſhed for exhibiting a Bill, no more than where a Bill is exhibited in the Star-Chamber for Matters examinable there; an Action on the Caſe lies not, altho' it be falſe; no more here.

Declaration laying an Acquittal before *A.* and *C.* Juſtices of Aſſiſe, ill, ſhould be of *Oyer* and *Terminer*.

No Action lies for preferring a Bill of Indictment.

But where two, or more, conſpire together, to procure one to be indicted for Felony, or Treſpaſs, and he is afterwards acquitted; it ſhall be intended by the Law to be maliciouſly done; for which Conſpiracy lies. But no Action would be in Hinderance of Juſtice. Wherefore, *&c.* But *Walmſley* doubted thereof; for the Declaration ſuppoſed it to be *malitioſe*. And there is not Reaſon, if any one, without Cauſe, will procure another to be indicted, but an Action will lie againſt him. Whereupon it was adjourned. 1 *Cro.* 560. *Francis Throgmorton*'s Caſe.

Otherwiſe on Conſpiracy of two to procure one to be indicted, be it of Felony or Treſpaſs.

An Action upon the Caſe was brought againſt two for procuring the Plaintiff to be indicted as a Common Barretor; and on a Writ of Error two Errors were aſſigned; firſt, That the Action ought not to be brought againſt two; becauſe the Procurement of the one was not the Procurement of the other.

Of joinder of Perſons in Caſe for malicious Indictment.

2ndly, There was a Place alledged where the Indictment was preferr'd; but no Place where the Procurement was; but no Judgment was given. *Latch* 262.

Case lies for malicious Suit in the Star-Chamber.

An Action on the Case lieth if one prefer a Bill in the Star-Chamber for a Thing not cognizable there. See 2 *Brownl.* 100. *Wood v. Buckley. S. C.* 2 *Ander.* 28.

For an Indictment of Barretry.

Action on the Case; for that he procured him to be indicted as a Common Barretor, before *J. S.* and *N. D.* Juſtices of the Peace; *necnon ad diverſas Felonias, &c. audiend' & terminand' aſſignat'*, and that he was acquitted. The Defendant demands *Oyer* of the Record, which is entred *in hæc verba*; wherein they are mentioned as Juſtices of the Peace only. Whereupon the Defendant demurred; becauſe it appears that it is not the ſame Record, whereof he now counts. And of that Opinion was *Williams*. But all the other Juſtices *econtra*; becauſe the Juſtices of the Peace have Authority to inquire and hear it, without any Special Commiſſion of *Oyer* and *Terminer*; and their Commiſſions are equal to that Purpoſe; and therefore all one, and no Failer of Record. 2 *Cro.* 32. *Barnes verſus Conſtantine. S. C. Yelv.* 46.

Oyer of the Record.

Variance betwixt that and the *Nar'*.

Caſe lies for maliciouſly indicting a Juſtice of the Peace, for diſcharging of a Vagrant.

An Action upon the Caſe for maliciouſly indicting the Plaintiff, being a Juſtice of the Peace, for delivering a Vagrant out of Cuſtody, without Examination, contrary to Law; upon Not guilty pleaded, a Verdict was found for the Plaintiff. And *Swain* moved for the Defendant, in Arreſt of Judgment, That ſuch Action doth not lie; becauſe it deters a Man from proſecuting for the King.

Maynard

Maynard, Serjeant, for the Plaintiff, Where the Indictment is preferred maliciously, and such Judgment contains Matter of Imputation and Slander, as well as Crime, there the Action lies; but otherwise where the Indictment contains Crime without Slander; as Forcible Entry, *&c.* but here is Slander as well as Crime; and of that Opinion was all the Court; and Judgment was given for the Plaintiff. *Raym.* 180. Sir *Andrew Henley ver.* Dr. *Burſtal.*

In Action upon the Caſe for cauſing a falſe Preſentment to be made againſt him before the Conſervators of the River of *Thames*, for ſuffering 8 Loads of Earth to fall into the River of *Thames*, and obtains a Verdict: The Defendant moves in Arreſt of Judgment, That it doth not appear by the Record what Authority the Conſervators had to take the Preſentment; and if they had no Authority, then it was *coram non Judice*; and the Plaintiff could not be prejudiced. *Twiſden* anſwered, It is well enough, though their Authority appears not by the Record, becauſe they have Authority given them by the Statute of 13 *R.* 2. *ch.* 9. which is a general Law, and ought to be taken Notice of; but if not, yet the Action is well brought; for it is brought for the Vexation the Plaintiff was put unto by Reaſon of the Preſentment; and the other Matter alledged is but by way of Inducement to the Action. 2 *Car.* in *Dent* and *Olife*'s Caſe, in this Court, ſo held; and tho' the Conſervators had not Authority, yet the Action lies for the malicious Proſecution, and for the unjuſtly vexing him; and ſo adjudged. *Trin.* 16 *Car.* in this Court in *Damon* and *Sherе-*

Caſe for cauſing a falſe Preſentment to be made before the Conſervators of the River *Thames*. Exception to the Declaration for not ſhewing what Authority they had,

man's Case. *Hale*, on the other Side, said, That this Court is not bound to take Notice, that the Lord Mayor of *London* hath this Jurisdiction of Conservatorship; for the Statute that gave it him is a particular Law touching him only, and so not to be taken Notice of without it be shewn; and then, if he have no such Authority, all the Proceedings against the Plaintiff are void. *Rolle* Chief Justice, An Action upon the Case lies for bringing an Appeal against one in the Common Pleas, tho' it be *coram non Judice*, by Reason of the Vexation of the Party; and so it is all one, whether here were any Jurisdiction or no; for the Plaintiff is prejudiced by the Vexation, and the Conservators took upon them to have Authority to take the Presentment. And I hold, That an Action upon the Case will lie for maliciously bringing an Action against him where he had no probable Cause; and if such Actions were used to be brought, it would deter Men from such malicious Courses as are so often put in Practice. *Style* 378. *Atwood* and *Monger*.

Case for affirming to the Sheriff more due than realy was; *per quod* he was detained in Prison.

In an Action on the Case the Plaintiff declared, That the Defendant did arrest him in *Middlesex*, and intending to detain him in Gaol, did falsly and maliciously affirm there was 5000 *l.* due; and that therefore the Sheriff ought to take Bail accordingly; *per quod* he was detained in Gaol several Days. The Defendant pleaded, That he affirmed the Plaintiff was in his Debt forty Pound; *absque hoc* that he said he was in his Debt 5000 *l.* The Plaintiff had a Verdict; and it was moved in Arrest of Judgment, That no Action lay as this Case was, because the Plaintiff was

was under a legal Arreſt, and the Sheriff was to detain him, or bail him at his Peril; but the Court gave Judgment for the Plaintiff. *Sid.* 424. *Daw v. Swain. S. C.* 1 *Mod.* 4. 1 *Lev.* 275. and 1 *Lev. Striber v. Johns* and *Wallers.*

Caſe in the Nature of Conſpiracy, for procuring one to be arreſted for a great Sum.

In an Action on the Caſe in the Nature of Conſpiracy; the Plaintiff declared, That the Defendants cauſed him to be arreſted by Proceſs out of the Sheriff's Court in an Action of 300 *l.* and *eundem* the Plaintiff *virtute ejuſdem Querel' arreſtari & impriſonari & in priſona detineri per ſpatium* 20 *dierum & noctium' cauſavere & procuraverunt ubi revera præd.* (one of the now Defendants,) *tempore levation. & affirmation' Querel' præd. verſus ipſu'* the now Plaintiff *non habuit aliquam juſtam cauſam Actionis ver.* the now Plaintiff, *ad damnum* 200. After Verdict for the Plaintiff, by which only one Defendant was found Guilty, three Exceptions were taken in Arreſt of Judgment, 1. No Place was alledged where the Plaint was levied, and where the now Plaintiff was arreſted. 2. That it did appear by the Declaration that the Plaint levied in the County was determin'd. 3. That one only was found Guilty; and that one Perſon could not ſingly conſpire. To the firſt Exception, the Court anſwered, That the Fact being tried in the proper County, if there were no *Venue*, 'twas aided by the 16 & 17 *Car.* 2. But here was a good Plea; for it is alledged the Defendant, *apud, &c.* levied the Plaint, and all the ſubſequent Facts relate to it. As to the 2d, That perhaps the Declaration might for that Cauſe have been ill on Demurrer, but was now aided by Verdict. As to the 3d,

That

One only found Guilty, yet the Plaintiff had Judgment.

That this being an Action on the Caſe, the Ground of the Action was the unlawful arreſting the Plaintiff, and not the Conſpiracy; and ſo the Court gave Judgment for the Plaintiff. But *Note*, The very learned Reporter ſeems to think, that for the laſt Exception Judgment ought to be ſtaid. 1 *Saund.* 228. *Skinner v. Gunton, Lyon* and *Leaſon. S.C. Raym.* 176. *S.C.* 1 *Ventr.* 12. See 1 *Bulſt.* 185. *Mod. C.* 170.

Evidence of Caſe for holding to extravagant Bail.

Caſe; for that the Defendant *colore cujuſdem Medii Proceſſ. in Lege* cauſed him to be arreſted; and tho' he offered a Common Appearance, held him to be bailed, where by Law no Bail was required; and Verdict *pro Quer'* on *Non Cul'p'*. *Et per Holt*, Chief Juſtice, This is a Tender Action. You muſt ſhew that the Plaintiff being indebted to the Defendant in ſo much, the Defendant took out ſuch a Writ for ſo much more, on purpoſe to hold him to Bail; how elſe can it appear to us whether, and how far, he might be held to Bail in that Action? And as to what *Carthew* ſaid, That the Writ was ſeldom returned; and they could not have it to give in Evidence; and therefore it would be inconvenient to ſet it out, eſpecially in the Declaration; the Chief Juſtice anſwered, He might have a Rule on the Officer to return his Writ. *Vide* 1 *Saund.* 228. And this Action lies not till the Original Action is determined. 1 *Salk.* 15. *Robins v. Robins.*

This Action lies not till the Original Action is determined.

Caſe for arreſting and detaining till he confeſſed Judgment.

An Action on the Caſe was brought for arreſting the Plaintiff, and detaining him in Cuſtody till he confeſſed Judgment. But the Court being divided, and no ſuch Action beſides being to be found in our Books, *Quære*, Whether it lies? 3 *Lev.* 210.

An

An Action on the Case lies if laid to be *falso, malitioſe & ſcienter*, for attaching the Plaintiff's Goods in the Hands of a third Perſon, for his Debt. 1 *Lev.* 129. *Saunders v. Powell.*

Case lies for malicious Attachment of Goods.

Bradley verſus Jones, 11 *rot.* 3390. The Plaintiff brings his Action upon the Caſe for unjuſt Vexation. The Defendant had exhibited Articles againſt the Plaintiff, to have the Good Behaviour againſt him, and took his Oath before Dr. *Cary*, one of the Maſters of the Chancery. And afterwards the Defendant ceaſed Proſecution there, and obtained from the King's Bench a *Supplicavit* to have the Good Behaviour there; and the Court was of Opinion, That the Action would lie, becauſe he proſecuted in the King's Bench, and not in the Chancery. But the Court ſaid, That if he had proſecuted in the Chancery, tho' the Articles had been ſcandalous, yet no Action would have lain; for a Man ſhall not be puniſhed for miſtaking the Law, for he may be miſadviſed by his Counſel. 1 *Brownl.* 3. *S. C. Godb.* 241.

An Action upon the Caſe, the Plaintiff declared, That *H. H.* had recovered againſt the Plaintiff in the Common Pleas, 20 *l.* and before Execution died; and that the Defendant knowing that, at *D.* in the County of *Norfolk*, *malitioſe & deceptive machinans* to outlaw the Plaintiff upon the ſaid Judgment, in the Name of the ſaid *H. H. &c.* in Performance of the ſaid Purpoſe at *W.* in the County of *Middleſex*, took out a *Capias ad Satisfaciend.* in the Name of the ſaid *H. H.* againſt the now Plaintiff, upon the ſaid Judgment, directed to the Sheriff of *London*; and *Non eſt in-*

Caſe for malicious Outlawry on a Judgment at the Suit of a Perſon who was dead.

inventus being returned upon that, took out an *Exigent* in the Name of the ſaid *H. H.* which Writ, by the Procurement of the Defendant, was returned, and then the Plaintiff was outlawed; and afterwards the Defendant, in the Name of the ſaid *H. H.* took out a *Capias Utlagatum* againſt the Plaintiff, directed to the Sheriff of *Norfolk*, by Force of which the Plaintiff was arreſted and impriſoned for two Months, until he had gotten his Charter of Pardon; by Reaſon of which Outlawry the Plaintiff had forfeited all his Goods and Chattels: And upon the ſaid Declaration the Defendant did demur in Law; and the principal Cauſe of the Demurrer was, becauſe that the Action might have been laid in *Middleſex*, where the Wrong began (*Scil.*) the *Capias ad Satisfaciendum*; the Outlawry for this Imagination at *D.* in the County of *Norfolk*, ſet forth in the Declaration, cannot give to the Plaintiff this Action. But if divers conſpire in one County for to indict one, and they put the ſame in Execution in another County, the Party aggrieved may lay his Action in which of the ſaid two Counties he pleaſeth. 22 *Eliz.* 4. 18, 19. For a Conſpiracy is more notorious than an Imagination; *Imaginatio eſt unius, conſpiratio plurimorum*; and in this Caſe the Delivery of the *Capias* at *D.* in *Norfolk*, is but Acceſſary, and the ſuing of the Proceſs aforeſaid at *Weſtminſter*, is the Principal. Upon the Part of the Plaintiff it was ſaid, That ſuch an Action might be laid in the County where the Plaintiff was wronged; and the Plaintiff is not to lay his Action in the County where the Original Matter, which was but Conveyance to the ſaid Wrong,

Demurrer to the Declaration.

Becauſe all the Tranſaction was not laid in *Middleſex*.

was

was done. And alſo, where the Cauſe of Action conſiſts of two Things, whereof the one is Matter of Record, and the other is Matter of Fact; there the Action ſhall be laid in ſuch County where the Matter of Fact may be more properly tried. *Vide* 11 *R.* 2. *Fitz. Action ſur le Caſe.* 36 *Br. lieu.* 48. In the principal Caſe at Bar, the Court was of Opinion that the Action was well brought in the County of *Norfolk*. Another Exception was taken to the Declaration, becauſe the Plaintiff hath there ſet forth, whereas his true Name is *John Bulwer*, by which Name he now ſues; he was ſued and outlawed by the Name of *John Buller*; and then the now Plaintiff upon that Matter was never ſued nor outlawed, and then is not grieved by the Defendant, but *John Buller*; for here in his Declaration there is not any Averment, that *John Bulwer* and *John Buller* are one and the ſame, and not divers Perſons. But the Exception was diſallowed; for the whole Court held, That foraſmuch as the Plaintiff hath declared that he, by the Name of *Buller*, was ſued and outlawed; the ſame is an Averment in Law, *&c.* and amounts to ſo much. Another Matter was objected, becauſe it appears in the Declaration, that *H. H* was dead before the Proceſs was ſued, and then the Outlawry was erroneous, and ſo the Plaintiff is not at any Miſchief. But that he may reverſe the Outlawry by Error, as in Conſpiracy; the Defendant pleads, That the Indictment upon which the Plaintiff is arraigned, is vitious and erroneous, and ſo his Life was never in Jeopardy. But as to that is was ſaid by the Court, That the erroneous Proceedings of the Defendant

But not allowed.

fendant ſhall not give Advantage to himſelf; but becauſe the Plaintiff was vexed by Colour and Reaſon of the Outlawry, and put to his Writ of Error, which cannot recompence the Loſs and Damage by him ſuſtained by Reaſon of the Outlawry aforeſaid, it is Reaſon the Plaintiff have his Action. Wherefore *Wray*, Chief Juſtice, *ex aſſenſu ſociorum*, gave Judgment for the Plaintiff. 4 *Leon.* 53. *Bullwer v. Smith.*

Caſe for maliciouſly laying an Action in *London*, and outlawing the Plaintiff.

Shafibey brought an Action on the Caſe againſt *Waller* and *Bromley*, and declared, That the Defendants conſpired, that the ſaid *Bromley* ſhould commence a Suit againſt the Plaintiff; and that the Plaintiff was then worth 5000 *l.* and that he was then dwelling in *Middleſex*, and that the Defendants knowing thereof, maliciouſly and falſly agreed, that the ſaid *Bromley* ſhould lay his Action in *London*, and proſecute till the Plaintiff was outlawed in the ſaid Suit, to the Intent that his Goods ſhould be forfeited to the King; and after, in Performance of the Agreement aforeſaid, the Plaintiff ſuggeſted, That he was dwelling in *London*, and laid his Action there, which was proſecuted until the Plaintiff here was outlawed to his Damage, *&c.* *Tanfield*, Chief Baron, thought, That if the Suggeſtion was by *Bromley* to make the Proceſs in a wrong County, it ſeemed that the Action ſhould lie againſt him only; but in Regard it is ſhewed in the Declaration, that the ſaid Suggeſtion was made by him in Performance of the precedent Agreement, that the Action lieth againſt both, which the Court granted. Then it was alledged in Arreſt of Judgment, That the Action did not lie, becauſe the Plaintiff in

in the Original Action was at Liberty to lay it in what County he pleaſed. 2. The Iſſue was not good; it being whether the Defendants were Guilty of the Agreement, and not as it ought to be, of the Practice; and that the Agreement with it had been put in Execution, was no Cauſe of Action. But the Court over-ruled both the Objections; and further reſolved, That in all Caſes where Strangers, who have nothing to do with a Suit, combine with the Plaintiff, an Action on the Caſe lieth. *Lane* 49. *Shafiby v. Waller* and *Bromley*

Caſe for ſuing the Plaintiff in the Name of *H.* without his Privity.

In an Action on the Caſe, the Plaintiff declared, That the Defendant arreſted and impriſon'd him at the Suit of *H.* without the Privity of the ſaid *H.* and 'twas held that the Action lay, tho' there was a juſt Debt due to *H.* for tho' *H.* might have lawfully done it, yet the now Defendant had no Authority to do it. *March* 47. *Thurſtone v. Eunnes.*

Caſe for ſuing in the Sheriff's Court for a Cauſe of Action ariſing out of their Juriſdiction.

The Plaintiff was indebted to the Defendant, for the Rent of a Houſe and Lands in the Country, and coming to *London* was arreſted by the Defendant, by Virtue of a Plaint levied in the Sheriff's Court of *London*, for which he brought an Action on the Caſe, and declared, *Quare cum* (the Defendant) *machinans & fraudulenter intendens eundem* (the Plaintiff) *magnopere prægravare & minus juſte apprimere* 15 *Aprilis anno* 10. *injuſte & malitioſe apud London, &c. eundem* (the Plaintiff) *prætextu & colore cujuſdam prætenſæ querelæ in Cur' Dom' Regis & Reginæ adtunc tent. coram Johanne Fleet, mil' tunc un' vic. Civit. London in computatorio ſuo ſituat' in parochia & warda præd' intrat' & levat' ad ſectam* (the Defendant) *ſuper quand. prætenſ.*

tenſ. Action' ad magnum prætenſum dampnu' ipſius (the Defendant) *arreſtari & impriſonari cauſavit & procuravit ac præd'* (the Plaintiff) *in priſona & cuſtod. ibid. ratione arreſtation' præd. per magnum tempus ſcil' per ſpacium ſex dierum detent. fuit pro defectu ſufficient. manucaptor. & ſecuritat. ad prætenſ. Action' præd' pro præd. prætenſ. dampno ubi revera & in facto præd.* (the Defendant) *tempore arreſtation' & impriſonament. ipſius* (the Plaintiff) *ut præfertur vel aliquod tempus antea nullam habuit cauſam Actionis verſus præfat'* (the Plaintiff) *infra Juriſdiction' ejuſdem Curiæ ratione quorum quidem injuſte & malitioſæ arreſtation' & impriſonament' ipſius* (the Plaintiff) *præd. idem* (the Plaintiff) *non ſolum in priſona & cuſtodia per totum tempus præd' detent' & de libertate ſua deprivatus fuit ſuper prætenſ. Action' præd' pro damnis præd' verumetiam magnos labores & expenſ. pro relaxation' ſua ab arreſtation' & impriſonament. præd' erogavit ac ſubire & erogare compulſus fuit unde dicit quod deteriorat. eſt & dampnum habet ad valentiam quinquagint. librarum & inde produit ſectam, &c.* Upon Iſſue joined they went to a Trial, and the Plaintiff had a Verdict. And now Serjeant *Tremaine* moved in Arreſt of Judgment, That there was no Reaſon (as he alledged) to ground an Action on the Caſe; for tho' the Sheriff's Court had not an Original Juriſdiction of the Cauſe, it being for Rent due for a Houſe and Lands in the Country, yet when the Plaintiff was in the City, that Court had a Juriſdiction over his Perſon.

Beſides, he might have pleaded to the Juriſdiction of that Action which was moved againſt him in the Compter, which he had not done; neither did he alledge in this Declaration, that he was held to unreaſonable Bail;

for if that had been ſo, there might have been ſome Colour for this Action; but upon the Proceedings, there is none.

If a Suit ſhould be commenced; for which there is but a probable Cauſe of Action, yet the Defendant in that Action ſhall not be intitled to another Suit againſt the Plaintiff.

So if there be a Judgment againſt the Defendant for a Debt and Damages, and before Execution the Money is paid to the Plaintiff, who thereupon releaſes the Defendant, and afterwards takes him in Execution within the Year; yet he ſhall not have an Action for this Vexation, but muſt bring an *Audita Querela.*

So likewiſe if he take him in Execution after the Year, it is erroneous; but an Action will not lie; he muſt bring a Writ of Error.

And for theſe Reaſons the Judgment was ſtaid. 4 *Mod.* 13. *Baugh verſus Killingworth. Show.* 254.

Of the Declaration.

The not alledging in the Declaration, That the Defendant in an Action on the Caſe, for arreſting one by Proceſs out of an Inferior Court for Cauſe of Action that did ariſe out of the Juriſdiction, that the Defendant knew it to be out of the Juriſdiction, is aided by Verdict. 1 *Ventr.* 369.

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So if there be a Judgment againſt the Defendant for a Debt and Damages, and before Execution the Money is paid to the Plaintiff, who thereupon releaſes the Defendant, and afterwards takes him in Execution within the Year; yet he ſhall not have an Action for this Vexation, but muſt bring an *Audita Querela.*

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A Precedent of a Declaration, and Proceedings in an Action on the Case for holding to Bail without Cause.

Memorandum, Quod alias scilicet termino Paschæ ultimo præterito coram Domino Rege apud Westm' venit Stephanus Robyns, Gen' per Edwardum Hoblyn Attor' suum & petit in Cur' dicti Dom' Reg' tunc ibidem quandam billam suam versus Johannem Robyns, Gen' in Custod' Mar', &c. de placito debiti. Et sunt plegii de prosequendo scilis Joha' Doe & Rich' Roe, Quæ quidem billa sequitur in hæc verba ff. Cornub' ff. Stephanus Robyns Gen' queritur de Johanne Robyns, Gen' in Custod' Mar' Marescl. Domini Reg' coram ipso Reg' existen' p eo videlicet quod cum prædict' Johannes nunquam habuisset aliquam legalem causam Actionis versus eundem Stephanus ita quod p legem hujus Regni Angl. corpus ipsius Stephani pinde capi & in Prisona quousq; idem Stephanus sufficien' manucaptores ad respondend' eidem Johanni in eadem causa inveniret detinend' deberet præd. tamen Johannes præmissa satis sciens sed machinans & malitiose intendens ipsum Stephanum in hac parte minus rite gravare opprimere & dampnificare & credentiam & reputation' suas quantum in ipso fuit pejorare & detrahere idem Johannes vicesimo octavo die Maij Anno Reg' Dom' Willielmi tertii nunc regis Angliæ, &c. nono apud Bodmyn in Com' p' eundem Stephanum pretu & colore cujusdam mandati processus in legibus exhibitari causavit ac licet ipse præd' Stephanus semper paratus fuit ad comparend' sup' tali processu ad diem retorn' inde ad respondend' eidem Johanni su-

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ta exigenciam ejusdem pceſſus dicus tamen Johannes eundem Stephanum vic ẽ anno ſupradict' apud Bodmyn p̃d imp̃iſonari ẽ ibidem in p̃iſona per ſpacium ſex menſium p eo tamen quod p̃d Stephanus ſufficien' manucaptores ad reſpondend' eidem Johanni ſuy pceſſ' p̃dict' invenire poteſſet detineri malicioſe procuravit ẽ cauſavit p quod p̃d Stephan. grandes denar' ſum' p ſuſtentatione ſua in p̃iſona p̃dict' expendere coact' fuit ac negoc. ipſius Stephani neceſſar' p tempus illl infecta remanſerunt ac idem Stephan' in modo ſuo vivendi magnopere deterioz' fuit in magnam animi ſui p̃turbation' ẽ fame ẽ credentie ſuarum leſionem manifeſtam unde p̃ed. Stephan' dicit quod ipſe deterioz' eſt ẽ dampnum habet ad valentiam centum ẽ quinquagint' libr̃arum Et inde p̃duxit ſectam, ẽc.

Et modo ad hunc diem ſcilt' diem veneris p̃x' poſt craſtinum ſancte Trinitatis iſto eodem termino uſque quem diem p̃d Stephanus habuit licentiam ad villam p̃dict' interloquendi ẽ tunc ad reſpondend', ẽc. coram Dom' Reg' apud Weſt' ven' tam p̃ed Stephanus p Attorn' ſuum ẽ p̃ed Johannes defend' vim ẽ inj̃ur' quando, ẽc. ẽ dicit quod ipſe non eſt inde culp' ẽ de hoc pon' ſe ſuy patriam. Et p̃ed Stephannus inde ſimiliter Jdem Ven' inde Jur' coram Domino Rege apud Weſtm' die mercur' p̃x' poſt tres ſeptimanas ſancte Trinitatis. Et qui nec, ẽc. ad recog', ẽc. quia tam, ẽc. Jdem dies dat' eſt partibus p̃dictis ibidem, ẽc. 2 Salk. 727. Robins v. Robins.

A Precedent of a Declaration, and the Proceeding in an Action on the Caſe for maliciouſly indicting the Plaintiff for a Rape.

De Termino Sci' Hillarii Anno Dom' Jac. nunc Reg' Angl' decimo. Rot. 921.

Wilts. ff. MEmorandum quod alias ſcilt Termino ſancti Michis ult' pt'it coram Dom' Reg' apud Weſtm. ven' Richardus Horwood Clericus p Danielem Wollett Attor' ſuum ꝯ ꝓtulit hic' in Cur' vicii Dom' Regis nunc ibidem quandam billam ſuam verſus Willielmum Corderoy Ar' Brigittam uxorem ejus ꝯ Dorotheam Coxe in Cuſtod' Mar', &c. de placito tranſgr' ſuꝑ caſum. Et ſunt pleg' de ꝓſequend' Johannes Doe ꝯ Richardus Roe que quidem billa ſequitur in hec verba ff. Wilts. ff. Richardus Horwood queritur de Willielmo Corderoy Ar' ꝯ Brigitta ux' ejus ꝯ Dorothea Coxe in Cuſtod' Mar' Marelc' Dom' Reg' coram ipſo Rege exiſtend' p eo videlt quod cum ꝓdictus Richardus bonus verus caſtus fidelis ꝯ honeſtus Dom' Regis nunc ſubditus exiſtit ac ut hujuſmodi bonus verus caſtus fidelis ꝯ honeſtus Dom' Regis nunc ſubditus exiſtit, ac ut hujuſmodi bonus verus caſtus fidelis ꝯ honeſtus Dom' Regis nunc ꝯ Domine Elizabethæ nup' Regine Angl' ſubdit' abſq; aliquo genere fornicationis adulterii ſpurcarij laſcivie luxurie ꝯ libidinis aut carnalis cognitionis alicujus femine aut puelle aut oblationis violentie alicui femine aut puelle ad eam carnaliꝫ cognoſcend' ſeu alicujus alterius criminis nocivi macula ac ab omni ſuſpitione eorundem a tempore nativitatis ſue hucuſque immunis intactus immaculat' ꝯ inſuſpect' vixit fuit ſe geſſit habuit ꝯ gubernavit bonorumque nominis

nominis fame condicionis conversationis & gesture per totum tempus pred' fuit Idemq; Richardus p diversos annos jam ultimos elaps' & hucusq; extitit vicarius vicarie de Thewte in Com' pdict' pdict' tamen Willielmus Brigitta & Dorothea pmissor' non ignar' felici Statui ipsius Richardi invidentes ac ex malicia sua prcogitata pverse intended' pd' Richardum de bonis nomine fama credentia & estimatione suis pdictis deprivare & denudare ac in publica infamiam & ignominiam inferre & Statu' ipsius Richardi penitus subvertere & ipsu' Richardum in forisfacturam omniu' bonor' & catal' terr' & tenementor' suor' vitaq; sue amiss' periculu' & discrimen inducere octavo die Mar' anno Regni Dom' Jacobi nunc Regis Angl' nono apud Civit' Novæ Sarum in Com' pd' falso & malitiose crimen felonie eidem Richardo imposuer' advunc & ibidem pretendend' & allegand' pd' Richardum felonice rapuisse & carnaliter cognovisse pd' Dorotheam falso & malitiose affirmabant ipsumq; Richardum ut felonem p quendam Thomam Coxe fratrem pd' Dorotheæ de felonia pd' pretens' felonico raptu & carnali cognitione pd' Dorotheæ advunc & ibidem falso & malitiose capi & arrestari caulaver' ipsumq; Richardum postea scilt' nono die ejusdem mensis Martij Anno nono supradict' apud Civit' Novæ Sarum pd' coram Authonio Hungerford Mil' advunc uno Justic' dicti Dom' Regis tam ad pacem in Com' pd' conservand' quam ad diversa felonias transgr' & alia malefac' infra pdict' Com' Wilts. pretract' & commiss' audiend' & terminand' assign' p pd' suppositio felonico raptu & carnali cognition' pd' Dorotheæ duct' & p ipsum Anthonium de & sup' pmissis advunc & ibidem scilt' dicto nono die Martii Anno nono supradicto apud Civitatem Novæ Sarum pd' examinari caulaver' & ibidem detineri quousq; idem Richardus advunc & ibidem simulcum quibusdam

Francisco Gosling & Willielmo Neal plegi' & manucapt ipsius Richardi cognoscitur quantum recognitionem dicto Dom' Regi vicesimi Primi Richardus in summa octoginta libr'arum legalis monete Angl' & uterq; eorundem manucaptor' suor' in summa quadraginta libr'arum consimilis monete Angl' cum condicione quod idem Richardus compareret ad pr'or' generalem sessionem pacis p' dict' Com' Wilts adtunc p' tenend' ad respondend' iis que ei adtunc & ibidem objicerentur falso & malicios' procurav' ad quam quidem generalem sessionem pacis tent' apud Devizes in Com' pred' vicesimo primo die Aprilis Anno Regni dicti Dom' Regis nunc decimo coram dicto Anthonio Hungerford Mil' Hen' Poole Mil' Edwardo Ludlowe Mil' & aliis adtunc Justic' dicti Dom' Regis tam ad pacem in Com' pred' conservand' quam ad diversa felon' trans' & alia malefacta infra dict' Com' Wilts perpetrat' & commis' audiend' & terminand' assign' idem Richardus comparuit & dict' Justic' adtunc & ibidem fecit ad generalem sessionem pacis dict' & malitiosam procurationem dict'orum Willielmi Corderoy Brigittæ & Dorotheæ & fur' dict' falsam pretensionem & allegationem dict' Willielmi Corderoy Brigittæ & Dorothæ apud Devizes dict' coegerunt dict' Richardum cognoscere aliam recognitionem dicto Dom' Regi in summa quadraginta libr'arum legalis monete Angl' cum condicione quod idem Richardus compareret ad pr'or' generalem Gaole dicti Dom' Regis Com' dict' deliberation' tenend' ad respondend' iis que ei adtunc & ibidem objicerentur, ad quam quidem generalem Gaole dicti Dom' Regis p' Com' Wilts deliberationem tent' apud Civit' Novæ Sarum p' in Com' pred' vicesimo tertio die Julij Anno Regni dicti Dom' Regis nunc Angl', &c. decimo coram Thoma Fleming Mil' Capital' Justic' dicti Dom' Regis

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ad placita in Cur' ipius Dñi Regis coram ipso rege tenend assign & Laurentio Tanfield Mil' Capitali Justic' dicti Dñi Regis hunc' tuñ assumt existen' Justic' eiusdem Dñi Regis ad generalem Gaole deliberand Com' illius & pisonar' in eadem existen' deliberand assign' idem Richardus comparuit & ꝓd Willielmus Corderoy, Brigitta & Dorothea assumt & ibidem scilt eodem vicesimo tercio die Julij Anno Regni dicti Dom' Regis nunc Angl', &c. decimo sup̃adicto ad ꝓdictam Civitatem Novæ Sarum tunc tent' coram ꝓd Justic' dicti Dom' Regis ad generalem Gaole deliberation' Com' illius & pisonar' in eadem existen' deliberand assign' malitiose exhibuer' quandam billam endictamenti in scripto in pergameno verbis ꝓd Richardum g nomen Richardi Horwood nup de Chute in Com' ꝓd Clerici continent in se hanc falsam & scandalosam materiam sequen' videlt quod predictus Richardus Horwood vicesimo die Decembris Anno Regni dicti Dom' Regis nunc Angl' Franc' & Hib' nono & Scotiæ quadragesimo quinto vi & armis apud Chute in ꝓd Com' in & sup̃ quandam Dorotheam Coxe ꝓdictam (ꝓdictam Dorotheam Coxe modo vel. innuendo) in pace Dei & dicti Dom' Regis assumt & ibidem existen' contra voluntatem ipsius Dorotheæ felonice rapuisset & carnaliter cognovisset contra pacem dicti Dñi Regis nunc coronam & dignitatem suas neconon contra formam statuti in hujusmodi casu edit' & ꝓvis'. Juratoribus magne inquisitionis ad eandem generalem Gaole deliberation' de felonijs & aliis malefactis in eadem Com' ꝓperat & commiss' ad inquirend ꝓ Dñm Rege & Corpore Com' ꝓd tunc & ibidem scilt apud Civitat Novæ Sarum ꝓdict' vicesimo tercio die Julij anno decimo sup̃adicto oner' & Jurat coram ꝓfat Justic' dicti Dom' Regis ad ꝓdictam general Gaole de-

L' Indictment.

deliberation' ibidem ac dicti Willielmus & Dorothea adtunc & ibid sup sacrad sua p adtunc malitiosam gurationem dicte Brigitte falso & malitiose affirmaverunt Juratoribus predictis billam predictam esse veram. Ac ipsum Richardum sup predictam billam Judicamenti coram predictis Justic' dicti Domi Regis ad predictam Gaolam & prisonar' in eadem existen' deliberand' allegand' adtunc & ibidem fecit apud Civit' Novæ Sarum predict' tercio vicesimo die Julij anno decimo supradicto falso & malitiose indictari conati fuerunt & laborav' ubi revera tota materia p' dict' versus dict' Richardum p' Willielmum Brigittam & Dorotheam sicut pfertur p billam predict' & affirmation' predict' object' falsa fuit & pretd' Richardus non rapuisset nec carnaliter cognovisset eand' Dorotheam per quod Jur' predicti predicte magne inquisitionis prepientes malitiam & falsas pretensiones p' Willielmi, Brigitte & Dorothee adtunc & ibidem non invenerunt billam predictam esse veram sed adtunc & ibidem retornav' bill' p' coram eisdem Justic' indor' cum hoc verbo Ignoramus Quar' quidem premissor' pretu p' Richardus Horwood non solum in bonis nomine fama credenc' & estimation' suis predictis multiplicit' lesus & pejorat' existit verumetiam apud quamplur' dict' Domi Regis nunc fuit' subdit' quibus innocentia ipsius Richardi in hac pte incognit' existit in grauem suspitionem rapuisse & carnaliter cognovisse predict' Dorotheam incidit & subditi ante dict' actione illa & Confortio & conversat' ipsius Richardi tanquam a Commissore & pretractore pretd' tevi Criminis ante dict' seipsos suberahunt & subduxunt. Et cum eodem Richardo put antea solit' fuerunt negotiar' seu Comercium habere omnino recusant & desistunt ideoq Richardus ingentes denar' summas p manifestatione innocentie ipsius Richardi

in

in hac parte p purgatione & exoneratione suis sup inde heuꝫ expendere & erogare coactus & compulsus fuit ac diversa lucra & officia que ipse in negotiis suis licitis gagend' tractando licite & honeste lucrari potuit occasione p̃missoꝝ tollit̃ p̃vidit & amisit ad dampnum ipsius Richardi centum libr̃arum & inde p̃ducit sectam, &c.

ff. Et modo ad hunc diem scilicet diem sabbti p̃x post Deab sci Hillarii isto eodem Termino usqꝫ quem diem p̃d Willielmus Corderoy Brigitta & Dorothea Coxe huer' licenc' ad billam p̃dictam interloquend & tunc ad respondend, &c. coram Dom̃o Rege apud Westm' ven̄ tam p̃d Richardus Horwood p Attorn̄ suum p̃d quam p̃d Willielmus & Brigitta ux' ejus & Dorothea Cox p Steph' Worley Attornatum suum Et idem Willielmus Corderoy, Brigitta & Dorothea defend vim & injur' quando, &c. & p̃dict Willielmus Corderoy & Brigitta ux' ejus dicunt quod ipsi non sunt inde Culpabiles Et de hoc pon̄ se sup patriam & p̃d Richardus Horwood similit, &c. & p̃dict Attorn̄ p̃dict Dorotheæ Coxe dicit quod ipse non est inform' p̃ p̃dict Dorotheam Magistram suam de aliquo respons' eidem Richardo p̃ p̃dicta Dorothea in loquela p̃d dict Et nichil aliud inde dicit in Barram sive p̃clusionem actionis ipsius Richardi p̃d p quod idem Richardus remanet inde versus p̃dict Dorotheam inde indefens', &c. Ob quod Cons' est quod idem Richardus dampna sua versus p̃dict Dorotheam occasione p̃miss' ei ut p̃fertur imposit' recuperare debeat sed quia nesciunt Cur' Dom̃i Regis hic que dampna p̃d Richardus illa occasione versus eandem Dorotheam sustinuit ideo tam ad triand exit̃ p̃dict inter p̃dict Richardum & p̃dict Willielmum & Brigittam superius junct quam ad inquirend que dampna idem Richardus

Barr. deux del' trois def. d'tes pled dont non cul' & al' Attorn. del' treice def. confesse Judgment per non est in form'.

chardus p̄ fīat Dorotheam exonacione p̄uiſ' ſi ut p̄feritur impoſit ſuſtinuit Wand inde Juratꝰ coram Dom̄o Rege apud Weſtm' die Sabbati p̄x' poſt Craſtin' purificationis beate Marie. Et qui nec, &c. ad recogn', &c. quia tam, &c. idem dies datꝰ eſt partibus p̄dictis ibidem, &c.

Nota. Diſtring' agard uſq; diem mercurii p̄x' poſt r̄n. Paſche extunc p̄xim' ſequen', &c. Judicium p̄ Quer' mis' r̄ſij. l. dampna in toto ad nonaginta duas libras & duodecim denarios. Breve de Errꝰ ſuperinde tranſcripſ̄ r̄ſij. die Maij anno r. Jacobi Regis p̄ſ' occaſione dilationis execucionis Judiciij p̄d ad treſdecim libras ſex ſolidos & octo denarios, &c. Winch. 96.

A Precedent of the Declaration and Proceedings in an Action on the Caſe for maliciouſly preferring a Bill of Indictment, which the Jury found *Ignoramus*.

Notr' ff. RIchardus Allen nup̄ de Bingham in Com̄ p̄dict' Husbandman attach' fuit ad reſpondend' Willielmo Muggleton de placito quare cum idem Willielmus bonus verus & fidelis ligeus dicti Dom̄i Regis nunc ſit & ut bonus verus & fidelis ligeus dicti Dom̄i Regis a tempore nativitatis ſue hucuſque abſq; ulla macula ſive ſuſpicione furti latrocinii felonie vel alicujus nocivi criminis ſe geſſit habuit & gubernavit & ita tam apud vicinos ſuos quam alias extraneas p̄ſonas habit' dictus nōſ & reputat' exiſtit p̄dictus tamen Richardus p̄miſſor' non ignarus machinans & malitioſe intend' bonū nomen famam credentiam & eſtimacionem ipſius Willielmi levare detrahere & pejorare ipſumque Wil-

Willielmum injuste molestare verare & gravare ac in vita bonor' & catallor' suor' amittionis gietum manifestum inducere & inferre vicesimo octavo die Julii Anno Regni Dom' Regis nunc Angl' vicesimo primo apud Bingham (conspirationem int' ipsum Richardum & Robertum Parr, Rolandum Hacker, Thomam Aldridge & Henricum Allen habit') falso & malitiose absq; aliqua causa seu colore alicujus felonie furti aut latrocinij p ipsum Willielmum unquam perpetrat' ipsum Willielmum p quadam felonia p ipsum Willelmum vicesimo quarto die Julij anno vicesimo primo suprad' apud Bingham predicta fier' suppos' (ubi revera nulla felonia p ipsum Willielmum in ea parte perpetrat' fuit) arrestari procurav': & ad generalem Gaole deliberation' p pred' Com' Nott. in eadem Com' Nott. coram Henr' Hobart Mil' & Baronetto Capital' Justic' Dom' Regis de banco & Edwardo Bromley Mil' uno Baron' Scacc' Domini Regis ac Justic' dicti Dom' Regis ad Gaolam dicti Dom' Regis de prisonarijs in ea existen' deliberand' assign' ac Justic' dicti Dom' Regis ad pacem in pred' conservand' necnon ad diversa felonias transgr' & alia malefac' in Com' pred' commiss' & perpetrat' audiend' & terminand' assign' tent' apud Nott' pred' in pred' Com' Nott' die lune vicesimo octavo die Julii anno Regni dicti Dom' Regis nunc Angl' vicesimo primo pred' Richardus p Abettamentum procuration' & instigation' predictorum Roberti Parr Rolandi Hacker Thomæ Aldridge & Henrici Allen prius ut prefertur apud Bingham habit' ad ipsum Willielmum defamand' & in vite sue amissionis ac omia terrarum tenementor' bonor' & catall' suor' forisfac' gietum inducere & tanquam furem & latronem arraisnari causand' pd crimen felonie pred' p ipsum Willielmum fieri supposit' eidem

Vid. Winch. Rep. f. 73.

Willielmo falso & malitiose advunc & ibidem imposuit ac quandam billam Judicamenti versus ipsum Willielmum advunc & ibidem scrib fecit continen in se hanc falsam & scandalosam materiam sequen videl quod idem Willielmus simul cum quos Lanceloto Harrison p nomina Willielmi Muggleton nuper de Bingham in Com pred Wheelwright, & Lancelot Harrison nuper de iisdem vill & Com Labourer vicesimo quarto die Junii anno Regni Dom Jacobi Dei Grā Angl' Franc. & Hiber. Regis fidei defensoris, &c. vicesimo primo & Scot' quinquagesimo sexto vi & armis apud Bingham pred in Com pred tria fultra Anglice three Bedsteds valoris cujuslibet eorum duodecim Solidorum unū ligneum instrumentum, Anglice one wooden Frame to hang Bacon on, valoris duor' solid unam gratam Angl one Cheese rack valor' quatuor solid diversos pannos pictos Angl painted Clothes valor' decem solid unū cribum, Angl one Tenis valoris ser denariorum' unam multram, Angl one Pale valoris ser denariorum' unū vasem, Angl' one Tub valoris duodecim denar' unū sedile, Angl one Chair valoris duodecim denar' diversos pulvinar' Angl Pillows valoris decem solidorum' unū lavell Angl one Blanket valoris quinq solid unū clausur Angl one Cock valoris sexdecim denariorum' unū cripodem Angl one Buffet Form valoris duor' solid ducent' palas Anglice two hundred Wooden Pales valoris viginti solidorum' & duo carectat feni Angl two Loads of Hay valoris utriusque eor' ser solid de bonis & catallis cujusdam Richardi Allen advunc & ibidem invent felonice furat' fuit cepit & asportavit contra pacem dicti Dom Regis nunc coronam & dignitat suas. Ac eandem Billam Judicamenti in forma pred scriptam continen in se falsam &

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ſcandaloſam materiam pretextat' Quod Richardus p abettamentū procurationem & inſtigationem Quod Roberti Parr, Rolandi Hacker, Thome Aldridge & Henr' Allen poſtea ſcilicet eodem viceſimo die Julii anno viceſimo primo ſupradicto Juſtic' Dom' Regis ad Gaolam Quod p Quod Com Nott' de priſonariis in ea exiſtent' deliberand' aſſign' necnon Juſtic' vicii Dom' Regis ad pacem in Com' Quod conſervand' necnon ad diverſa felonias erangt' & al' malefact' in Com' pred' commiſſa & perpetrat' audiend' & terminand' aſſign' apud Nott' Quod exhibuit Quam quidem billam indictamenti eidem Juſtic' adtunc & ibidem de eod' Richardo receperunt & publice legi fecer' ac illam ſuper inde Jur' magne inquiſitionis p' eos Com' Nott' ad eand' General' Gaole illius deliberationem ſup' ſacroſcā Dei Evangelia adtunc & ibid' onerat' & Juratī adtunc & ibid' deliberader' ad inquirend' & veritatem de & ſuper materia in eadem billa content' plenius ſup quo Quod Richardus p abettament' procuration' conſpiration' & inſtigationem pd' Roberti Parr, Rolandi Hacker, Thomæ Aldridge & Hen' Allen poſtea ſcil' Quod viceſimo octavo die Julij anno viceſimo primo ſupradict' ad eand' Gaole deliberationem p' cor-poze Quod Com' Nott' apud Nott' Quod coram pfat' tunc Juſtic' ad Goalam illam deliberand' ut pfertur aſſign' necnon Juſtic' vicii Dom' Reg' ad pacem in Com' Quod conſervand' necnon ad diverſa felonias erangt' & alia malefact' in Com' pd' commiſſa & perpetrat' audiend' & terminand' aſſign' ibidem materiam Quod in Billa Quod content' falſo & ſcandaloſe & malitioſe pfat' Jur' magne inquiſitionis pred' ſuper ſacrū ſuum in Evidentiis dedit ſore veram ubi revera materia illa in eadem Billa content' fuit falſa ficta & ſcandaloſa & p pd' Richardum p abettamentū conſpirationem

prurigionem & instigationem ꝑdict' Roberti Parr Rolandi Hacker, Thome Aldridge & Henr. Allen ꝑd malitiose machinat' & devisa abq aliqua justa causa vel ꝓbabili eunc plene apparebat ac ea ratione Jur' ꝓcedi pot' Et ꝓtextus ꝑd eis dat' assumt & ibidem dederunt verdict' & respons' suu de & concernen billam ꝑd quod ideo Jur' de visnet ꝑd in ꝑd billa indictamt' spec' content' ignorantes fuerunt quor' quidem ꝓditor' ꝑdict' ꝓtextu idem Willielmus non solum in bonis nomine fama opinione & credenc' suis ꝑdict' multiplicit' lesus & verum etiam in magnos labores & turbation' tam p impositionamentu' corpoꝛis sui quam p erogationem expenditionem diversar' pecunie summarum p inlargiamento suo in ea parte & purgatione sua ꝑd subire & expendere cogit' fuit ad dampnum ipsius Willielmi quadraginta libraꝛum, &c. Et unde idem Willielmus p Johannem Martyn Attorn' suu' queritur quare cum idem Willielmus bonus verus & fidelis ligeus dicti Dom' Regis fit & ut bonus verus & fidelis ligeus dicti Dom' Regis a tempoꝛe Natiuitatis sive huiusq abiq ulla macula sive suspition' furti latrocinii felonie vel alicujus noxibi Criminis se gessit habuit & gubernavit & ita tam apud vicinos suos quam alios extraneas personas habit dictus vot & reputat extitit ꝑd tamen Richardus ꝓditor' non ignar' machinans & malitiose intendens bona nomen famam credentiam & estimation' ipsius Willielmi ledere detrahere peꝛjoꝛare ipsumque Willielmum injuste molestare dedare & ꝓturbare ac in vite bonoꝛum & catallorum amission' periculum manifestum inducere & inferre vicesimo octavo die Julii Anno Regni Dom' Reg' nunc Angl' vicesimo ꝓximo apud Bingham conspirat int ipsum Richardum & Robertum Parr, Rolandum Hacker,

Thomam

Thomam Aldridge & Henr' Allen [illegible] & malitiose absque aliqua causa seu colore ali- cujus felonie furti aut latrocinii p ipsum Willielmum unquam ppetrat ipsum Willielmum p quodam felonia p ipsum Willielmum vicesimo quarto die Julij anno vicesimo primo suppositis apud Bingham pdcm fieri suppositis alia vera nulla felonia p ipsum Willielmum in ea parte ppetrat fuit arrestari procuravit & ad generalem Gaole deliberat p pdcm Com' Nott. in eadem Com' Nott. coram Henrico Hobart Mil', Barr' Capitat Justic' Dom' Reg' de banco & Edwardo Bromley, Mil' uno Baron Scacc' Dom' Reg' ac Justic' diuti Dom' Regis ad Gaol diuti Dom' Regis de prisonariis in ea existen' deliberand assign' ac Justic' diuti Dom' Regis ad pacem in Com' pdcm conservand necnon ad diversa felonias transgr' & alia malefac in Com' pdcm commissa & ppetrat audiend & terminand assign' tent apud Nott. p[illegible] in pdcm Com' Nott. die Lune vicesimo octavo die Junij Anno Regni diuti Dom' Reg' nunc Angl' vicesimo primo pdcm Richardus per abettamentum procurationem & instigationem pdcm Roberti Parr, Rolandi Hacker, Thomæ Aldridge & Henr. Allen primus ut profertur apud Bingham pdcm habit ad ipsum Willielmum defamand & in vite sue amissionis ac omnium bonorum catallorum suorum forisfact pdcm inducere tanquam furem & latronem arraniari causand pdcm crimen felonie pdcm p ipsum Willielmum fieri suppos[illegible] eidem Willielmo falso & malitiose adtunc & ibidem imposuit ac quandam billam Indictamenti versus ipsum Willielmum scribi fecit continen in se hanc falsam & scandalosam materiam sequen videlt quod idem Willielmus simulcum quodam Lancelot. Harison p nomina Willielmi Muggleton nup de

Bingham

Bingham in Com' ꝑdict Wheelwright & Lancelot. Harrison nup de Wilk & Com' ꝑd Labourer vicesimo quarto die Julij Anno Regni Dom' Jacobi Dei Gꝛa Angl' Franc. & Hiber Regis fidei Defensoꝛis, &c. vicesimo ꝓximo & Scot. quinquagesimo sexto vi & armis apud Bingham ꝑdict in Com' ꝑdict tria fulcra, Anglice three Bedsteads valoꝛ' cujuslibet eoꝛum duodecim solidoꝛum unū ligneū instrumentum, Anglice one wooden Frame to hang Bacon on valoꝛ' duodecim solidoꝛ' unū gratem, Anglice one Cheese Rack valoꝛ' quatuoꝛ solidoꝛum diversos pannos pictos, Anglice painted Clothes valoꝛ decem solidoꝛum unum cribū, Anglice one Tenis valoꝛ' sex denarioꝛum unum mulctrā, Anglice one Pail valoꝛis sex denariorum unum vasem Anglice one Tub valoꝛis duodecim denar' unum sedile Anglice one Chair valoꝛ' duodecim denar' diversos pulvinar' Anglice Pillows valoꝛ' decem solidoꝛum unum lanеū, Anglice one Blanket valoꝛ' quinque solidoꝛ' unum clausulum Anglice one Lock valoꝛ' sexdecim denariorum unum tripodem Anglice one Buffet Form valoꝛ' duoꝛum solidoꝛum ducent' Palas Anglice two hundred Wooden Pales valoris viginti solidoꝛum & duo carectat' feni Anglice two Loads of Hay valoꝛis utriusque eoꝛum sex solidoꝛum de bonis & catallis ejusdem Richardi Allen adtunc & ibidem invent felonice furat' fuit cepit & asꝑoꝛtavit contra pacem dicti Dom' Regis nunc coꝛonam & dignitat' suas. Ac eandem billam inviamenti in forma ꝑdict' scriptam continuēd in se falsam & scandalosam materiam ꝓcitat' ꝓdictus Richardus per abettamentum ꝓcurationem conspirationem & instigationem ꝑdictoꝛum Roberti Parr, Rolandi Hacker, Thomæ Aldridge

Aldridge & Henr. Allen postea scilicet eod vicesimo octavo die Julij anno vicesimo primo supradicto predict tunc Justic vicit Dom' Reg' ad Gaolam predictam & predicta Com' Nott' de prisonariis in eadem existen deliberand affign necnon Justic dicti Dom' Regis ad pacem in Com' predict' conservand necnon ad diversa felonias transgres' & alia malefact in Com' pred commissa & perpetrat audiend & terminand affign apud Nott' predict & habit quam quidem billam indictamenti ijdem Justic' advunc & ibidem de eadem Richardo receperunt & publice legi fecer' ac illam superinde Jur' magne inquisitionis pro eadem Com' Nott' ad eandem generalem Gaole illius deliberationem super sacrosancta Dei Evangelia advunc & ibidem oner & Jurat advunc & ibidem deliberaber' ad inquirend & veritatem de & super materia in eadem billa content presentand super quo predict Richardus per abettamentum procurationem conspirationem & instigationem predictorum Roberti Parr Rolandi Hacker Thomæ Aldridge & Henrici Allen postea scilicet predicto vicesimo octavo die Julij anno vicesimo primo supradict ad eandem Gaole deliberation pro corpore predicti Com' Nott. predict coram prefat tunc Justic ad Gaolam illam deliberand ut prefertur affign necnon Justic dic' Dom' Regis ad pacem in Com' predict conservand necnon ad diversa Felonias Transgres' & alia Malefacta in Com' predict commissa & perpetrat audiend & terminand affign ibidem materiam predictam in billa predicta content falso malitiose & scandalose prefat Jur' magne inquisitionis predict super sacram suum in Evidencia dedit fore veram ubi revera materia illa in eadem billa content fuit falsa ficta & scan-

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valoſa & per predict Richardum per abettamentum conſpirationem procurationem & inſtigationem pred Roberti Parr Rolandi Hacker Thomæ Aldridge & Henrici Allen pred malitioſe machinat & devisat abſque aliqua juſta cauſa prout Jur' pred tunc plene apparebat ac ea ratione Jur' pred poſt Evidencias pred eis dat adtunc & ibidem deberunt veredictum & repons' ſua de & concernen billam predictam quod iidem Jur' de materia pred in predict billa Indictamenti ſpec & contenk ignorantes fuer' quorum quidem premiſſorum pred pretextu idem Willielmus non ſolum in bonis nomine fama opinione & credencia ſuis pred multipliciter leſus eſt verumetiam in magnas labores & perturbation' tam per impriſonamentum corporis ſui quam per erogationem & expenditionem diverſarum pecunie ſummarum p inlargiamento ſuo in ea parte & purgatione ſua pred ſubire & expendere coact fuit ad dampnum ipſius Willielmi quadraginta libarum. Et inde producit ſect, &c. Winch 184.

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References to all the other printed Precedents of Actions on the Caſe for malicious Accuſations and Proſecutions that are extant in the Books of Entries.

De impoſitione criminum.

De oneratione quer' cum felonia, ductione coram Juſtic' pacis & examination' ulteriori coram Juſtic' ad ſeſſionem. Her. 71.

De verbis furti ratione quorum quer' fuit arreſtat. pro ſuſpitione feloniæ per mandat. Juſtic' in London & detent' quouſq; invenit manucaptores ad comparend. ad proximam ſeſſionem pacis ad quam fuit dimiſſus per proclam'. Ra. Entr. 12.

De falſis billis exhibit' verſus quer' de falſa inrotulatione placitorum in Com' banco, & procuratione quer' ſæpius examinari ſuperinde. Ra. Entr. 13.

De billa ſcandaloſa verſus Quer' fixa ad oſtium eccleſiæ. Ibid.

Pro nuncio Regis de falſa & ſcandaloſa petitione ver. eum exhibit. Juſtic' ad ſeſſionem. Her. 153.

Pro Attorn' de falſis articulis exhibit. verſus eum in Cancellar', unde ſuper ſacramento def. breve de bona geſtura emanebat, & quer' arreſt' fuit ſuperinde. Her. 157.

Verſus Abettors in Appeal. *Ra. Entr.* 43, 44.

De oneratione Quer' cum felonia ductione coram Juſtic' pacis in London & detent' quouſq; invenit manucaptores ad comparend' ad proximam ſeſſionem pacis ad quam dimiſſus fuit per proclam'. Ra. Entr. 339. *Simile,* Vid. 145.

Pro nuncio Regis de falsa & scandalosa petitione versus eum exhibit, ad Justic' ad session' pacis & per eos deliberat' privato consilio Regis. Ra. Entr. 72.

Pro legum Doctor' & Official' principal' Epi' L. de falsa & scandalosa petitione versus eum exhibit' al' Committee de Parliament. Vid. 36.

Simile de petitione impressa & publicata. 1 Saund. 120.

Pro Attorn' de falsis articulis exhibit' versus eu' in Cancellar', unde super Sacramento def. breve de bona gestura e Banco Regis emanavit & Quer' arrestat' fuit superinde. Ra. Ent. 75.

De felonia imposit. coram Justic. pacis apud Westm. 1 Bro. 82.

Note, in the Tables to the Books of Entries this is referred to Page 76. but falsly.

Pro consillario ad Legem de scandaloso libello. 2 Bro. 22.

De Indictamentis.

De verbis intoxicationis & indictamento ad assisas unde quer' acquietat'. Co. Entr. 25.

De imprisonamento & indictamento quer' ad specialem sessionem de furto, unde quer' fuit acquietat'. 1 Bro. 207.

De impositione criminis feloniæ & procuratione quer' super Sacro' def. indictari, unde quer' placitavit & fuit acquietat' super triatione. 3 Bro. 109.

De felonia imposit. quer' & indictamento superinde. 27 H. 8. 11.

Simile in Midd'. Ash. 26.

De ductione quer' coram Justic. pacis oneratione cum Roberia recognic' pro comparenc' ad assisas iterim oneratione ibidem cum Roberia, billa Indictamenti Sacro' def. superinde, & ignoramus. Her. 96.

Def. conſpiratione præhabito cum alio cauſavit quer' capi de roberia indictament' ad aſſiſas impoſitione criminis roberiæ Sacro' Def. ad billam indictamenti & ignoramus inde. Her. 147.

Pro Attorn' indictat' in Landon de perjurio & acquietat' ſuper triatione. Aſh. 24.

Super indictamento de Barretria. Her. 88, 226.

Verſus 2 def. qui fecerunt quer. indictari de Barretria in London, unde acquietat' ad ſeſſionem de Newgate. Ub. 31.

De impoſitione criminis feloniæ & procuratione quer' ſuper Sacro. Def. indictari unde quer' placitavit & fuit acquietat' ſuper triatione. Tho. 43.

Simile pro Attorn'. Win. Entr. 74. Bro. R. 22.

Simile de acceſſor'. feloniæ. Tho. 35.

De felonia impoſit. quer' & indictamento ſuperinde in Midd'. 1 Bro. 3.

Simile. Re. Dec. 105, 131. Cl. 39.

Simile ad aſſiſas & ignoramus inde. 2 Bro. 17.

De exhibitione indictament. feloniæ verſus quer' ad general' Seſſion' & recogn' cum manucaptoribus pro comparentia ad aſſizas & ibid' de felonia acquietat' fuit per patriam. Win. Entr. 74.

Def conſpiration' cum aliis præhabita cauſavit quer' capi de felonia indictament' ad aſſizas, Sacru' def. ad billam indictament' & ignoramus inde. Win. Entr. 104. *Simile,* Bro. Va. Mec. 42. *Placitum inde.*

Simile de Roberia. Ra. Intr. 68. *Simile,* 2 Mo. Int. 100.

De ductione coram Juſtic' pacis onerat' cum Roberia Detentione priſona quouſq; invenit manucaptores pro comparent' ad aſſizas, iterum onerat' quer' ibidem de Roberia, billa indictamenti per def. exhibit', & Sacro. ejus ſuperinde acquietant' per Jur'. Han. 30.

De impriſonamento & indictamento quer' ad ſpecial' ſeſſion' coram preſidente Walliæ de furto unde quer' fuit acquietat'. Ra. Entr. 341. Br. R. 25.

Simile ad aſſizas unde ignoramus. Han. 25, 53.

De verbis furti & indictamento ad aſſizas unde quer. fuit acquietat'. Tho. 36.

Pro Clerico verſus 3 qui cauſaverunt quer' capi de raptu puellæ recogn' pro comparent. ad ſeſſion' & abinde recogn' pro comparenc' ad aſſizas billa indictament. ibidem de raptu pred. Sacru' def. ſuperinde & ignoramus. Wi. Entr. 98.

Simile ad aſſizas tantum. Pl. Gen. 48.

Simile pro indictand' quer. pro inſultu & conatu ad rapiend uxor' def. Cl. 28.

Super indictamento Barretriæ ad Seſſionem pacis. 1 Bro. 18. Br. R. 20.

Verſus 3 qui cauſaverunt quer' indictari de barretria in London unde fuit acquietat. ad ſeſſion' de Newgate. Ra. Entr. 340.

Simile de procuratione quer' indictari pro forgeria. Bro. 22.

Pro Clerico indictat' per def. ad ſeſſion' pacis pro crimine ſodomitico de Sacro. ad indictament. & Ignoramus inde. 2 Bro. 21.

Super Indictamento de Conjuratione ad aſſizas. 2 Bro 24.

Pro indictament. per tria indictamenta. 1. *Pro obſtructione viæ injuſte & riotoſe, &c.* 2. *Pro ingreſſu' in terras illicite & manu fort'.* 3. *Pro trans' in terr' illiute & injuſte & Succiſſione fenſur', &c.* Cl. 24.

Pro indictando quer' tangen. viam publicam per ipſum occeluſam. Id. 31.

Pro indictando quer. pro inſultu & affraia ubi ignoramus recogn. per magn' inquiſitionem. Id. 32.

De pronunciando quer' fore excomm' abſque cauſa rationabili. 2 Bro. 20.

Pro

Pro informando in Banco Regis de Perjurio. Cl. 25.
Simile pro informando verſus quer. quod. rioteſe cum aliis aſſemblat. fuit & def. illicite verberavit, &c. Cl. 27.

De indebita profecutione.

In Cur' Admiralitatis. Ra. Entr. 23. 24. Dyer 159. v. *actionem ſuper ſtatut'.*
In Cur' Chriſtianitat. poſt prohibit. deliberat. & projecit in Lutu. Tinbr. 92.
De arreſtat. quer. in Cur. Civitat. ſine cauſa actionis Aſh 4.
De execut. brevis poſt breve de errore allocat'. Her. 233.
De arreſtatione in Cur. Civitat. ſine cauſa actionis. 1 Bro. 36.
Simile Ubi Cur' non habuit Juriſdiction', &c. Cl. 35. *Simile ſecund. conſ' Regni fundit.* Id. 35.
Simile & detention' quer. in priſona quouſq; invenit manucapt'. Br. R. 61. *Simile* Cl. 34.
Simile ſuper proceſs' e Banco Regis. Bro. mec. 25.
Simile ſuper cap' e Com' Banco & proceſs' extra Cur. inferior. ad ſect. Def. ſine cauſa actionis. Tho. 72.
Simile ſuper cap' e Com. Banco ac etiam bille ad ſect. Def. Bro. R. 50.
Simile per bill. de Midd' ad ſect. def. & al'. Vid. 36.
De indebita profecutione in Cur' Principalitatis Wallie. Ra. Entr. 62.
Pro Attorn. verſus Attorn. de arreſtation. & impriſonament. quer. ſur' briefe de privilege & procuratione quer. arreſtari ad ſect. al' ſine cauſa actionis. Ra. Entr. 90.
De attach. Quer. per catalla in Cur. dele Cheny ad ſect. R. ſine ejus conſenſu. Han. 53.

Eo quod quer' bis arreſtat. fuit contra aſſumption. Def. Cl. Aſs. 230.

Pro Attorn. verſus un' qui traxit eum in placitum coram commiſſionar. concernen' Cauſas Eccleſiaſticas & indebitum exercitium Officii ſui Attorn. Cl. Aſs. 205.

Simile pro proſecutione in Cur. Chriſtian' ſine cauſa. Cl. 34.

Eo quod def. fecit quer. pro infamia arreſtari in London. Cl. Aſs. 213.

Eo quod def. malitioſe proſecut. fuit breve de Ca. Sa. nomine alterius abſque Warranto. Br. R. 47.

De pronunciando quer. fore excommunicat. abſque cauſa rationabili. 2 Bro. 20. Tho. 59.

Pro proſecutione quer. ſuper ſcript. obl' Vic' ſine cauſa. Cl. 33. See Lutw. 67, 68.

CHAP. VI.

Of Nuſances.

NUſances are ſuch as concern the Land and the Ways, or Houſes; of thoſe we will treat in the firſt Section, and in the ſecond of theſe; and in the Third and Laſt, add ſuch Precedents of Declarations as were adjudged moſt uſeful, with References to all that are extant in the Books of Entries.

SECT.

SECT. I.

Of Nuſances in Ways to Lands.

In Caſe for Nuſance, if the Writ be *Vi & Armis*, 'tis naught.

IN an Action upon the Caſe, becauſe the Defendant had made a Gate in one Town for which he could not go to his Cloſe in another Town. *Cook* took Exception that the Writ was *vi & armis*; and it was agreed *per Curiam*, That for that Cauſe it was not good; alſo the Viſne was of one Town only, whereas it ſhould have been of both; for he ſaid, That in *Hankford* and *Ruſſell*'s Caſe, the Nuſance was laid in one Town, *per quod* his Mill in another Town could not grind, and upon Not Guilty pleaded, the Viſne came from one Town only: and it was adjudged that it was not good. *Godb.* 54.

Viſne, when two Towns.

How to preſcribe in the Inhabirants of a Place.

An Action upon the Caſe was brought for ſtopping up a Way, and Iſſue upon Not Guilty was found for the Plaintiff, and moved in Arreſt of Judgment, becauſe in the Count the Plaintiff hath preſcribed that the Inhabitants of *C.* have uſed to have a Common Croſs-way, *&c.* and that he is an Inhabitant in a Meſſuage in *C.* and hath not ſhewn that *C.* is *antiqua villa*. But by the Court that was diſallowed, and the Preſcription held good enough; for he doth not claim any Right or Intereſt in the Croſs-way, but only an Eaſement. *Vide* 6 *Coke.* 59. *Dy.* 10. *Noy* 120. *Stone v. Wakeman.*

If

What Special Damage ſufficient to maintain an Action for a Publick Nuſance.

If a Publick Way is ſo ſtopped that a Perſon is thereby obliged to carry any Thing a longer or worſe Way, 'tis a ſufficient Special Damage to maintain an Action on the Caſe. *T. Jones*, 156. *Hart v. Baſſett.*

Caſe for ſtopping a Highway leading to the Plaintiff's Colliery, with Intent to deprive him of the Profits thereof, *per quod* he loſt the Profit, &c. and his Coals were ſpoiled for want of Buyers; Court divided whether Action lies or not. No Action lies in a publick Nuſance without Special Damages.

Caſe, and declared, That he was poſſeſſed of a Colliery, and that there was a Highway near, by which he uſed to carry his Coals, and that he had a certain Quantity of Coals dug ready for Sale; and that the Defendant dug a Colliery near his, and intending to draw away his Cuſtomers, and deprive him of his Colliery, ſtopped up the ſaid Way, ſo as Carts and Carriages could not come to his Colliery, *per quod per totum tempus prad. profic. ſuum Carbonariæ ſuæ prad. totalit. perdidit. & carbones ſui prad. pro defectu emptorum ex cauſa prad. magnopere deteriorat. & depreciat. devenerunt. Non Cul'* and Verdict *pro quer'*.

All the Court agreed, That where an Action lies for a publick Nuſance, there muſt be a Special Damage; for he that did the Nuſance is puniſhable at the Suit of the Publick; and to allow all Private Perſons their Actions, without Special Damage, would create an infinite and endleſs Multiplicity of Suits. *Et per Turton* and *Gould*, Here is a Special Damage, and well enough ſet forth; for all have not Coal-pits, and the Matter ſubſequent to the *per quod* is not traverſable. *Vide* 1 *Roll.* 89. *Goldsb.* 146. 1 *Leon.* 236. 1 *Roll.* 63. *pl.* 31. 1 *Co.* 51. *Ventr.* 114, 126. 2 *Jo.* 146, 156. a ſtrong Caſe. To ſhew a Special Damage 'tis ſufficient to ſay *per quod ſervitium*, for ſuch a Time, *amiſit. Hob.* 284. *evexit ad nocument. liberi tenementi ſui.* 9 Co. 53. *per quod Commun. habere non poteſt in tam amplo modo & forma*, and the

the Damage does not consist in a single Instance, as *per quod maritagium amisit* which may be shewn; but in *casu principali* it would be infinite. *Rokeby* and *Holt*, Chief Justice, *contra*. The Plaintiff's near Situation yields him a Convenience, but no Right; for it is the King's Highway, for the equal Use and Benefit of all his Subjects, and the Plaintiff hath no more nor no better Right than any Body else; and they held a Man should not have a particular Action without a particular Injury or a particular Right, which are the Grounds upon which all Actions are founded, and to which they must conform. *Vide* 2 *Saund.* 115. 3 *Cro.* 664. This Plaintiff had neither a particular Right in this Way, nor a particular Injury; for the Stoppage is common to every one as well as to him, and an Indictment would lay it *ad nocumentum omnium subditorum per viam illam transeun'*; and the Cases cited on the other Side were founded on a particular Right; as Case for a Stoppage where one hath a Way, a Watercourse or Common to his House, Mill or Tenement, there the Action is founded on a particular Right, and lies without the *per quod*.

No Man can have Action without a particular Injury or a particular Right.

3dly, They held, That supposing there was a particular Injury by special Damage, that special Damage is not sufficiently set forth; for it is not sufficient to say he lost Customers, or Buyers could not come, without shewing Buyers were coming, and were hindred. *Vi.* 2 *Lev.* 214, 232.

Not sufficient to shew in general that Customers could not come, but must shew especially that Customers were coming and were hindred.

And the Case in 1 *Roll.* 53. has been often denied, and is not Law; for the Damages must be specially shewn where the Words themselves are not actionable. 1 *Roll.* 58. *n.* 1.

1 *Cro.* 140. 1 *Roll.* 34, 35, 36. muſt ſhew who refuſed. And the Chief Juſtice cited the Caſe of *Paine* and *Partridge*, 2 *W. & M.* in this Court. Caſe for not keeping of a Ferry-boat, which was for all the King's People paying Toll, but *gratis* for the Inhabitants of ſuch a Village, of which the Plaintiff was one; in this Caſe the Court held the Cuſtom to be good, but that the Action doth not lie; for tho' the Plaintiff has a particular Right, yet that conſiſts in being exempt from Toll, and not in paſſing, which is common to all; ſo that the not keeping the Ferry is a publick Nuſance, for which the Plaintiff cannot maintain an Action more than any other Perſon, but the Defendant muſt be indicted. The Court being thus divided, and there being a former Rule to ſtay Judgment, no Judgment could be entred. *Et per Cur'*, If the Court had been divided on the firſt Motion, the Plaintiff might have entred Judgment; but now this Rule muſt ſtand, or be diſcharged; and diſcharged it cannot be, becauſe the Court is equally divided. 1 *Salk.* 15. *Fveſon verſus Moore.*

On Motion in Arreſt of Judgment Rule made to ſtay Judgment *quouſque*, *&c.* and afterwards the Court was equally divided whether the Action lay, the Plaintiff could not have Judgment, becauſe no Rule could be made to diſcharge the firſt.

In Caſe for ſtopping of a Way, after Verdict, it was moved in Arreſt of Judgment, That the Plaintiff had not intitled himſelf to the Way by Preſcription, yet the Declaration was held good, being after a Verdict. 1 *Vent.* 174. *St. Johns v. Moody. S. C.* 2 *Lev.* 214. the like Exception was taken to a Declaration for Stopping after Judgment by Default, but over-ruled. 3 *Lev.* 266. *Windford v. Wooleſton.* See 2 *Vent.* 186. *Lut.* 119.

Declaration for ſtopping a Way good, without preſcribing for a Way.

In

In an Action upon the Caſe; the Plaintiff declared, That he was ſeized in Fee of an Houſe and Land in *D.* where he had Common appurtenant in ſuch a Place; and that he, and all thoſe, whoſe, *&c.* had a Way from the ſaid Place, wherein, *&c.* and that the Defendant *totaliter* had ſtopped up his Way whereby he could not come to his Common, but had altogether loſt the Uſe thereof, *&c.* The Defendant pleaded Not Guilty, and found againſt him, and Judgment given for the Plaintiff; and Error was aſſigned, becauſe he ought not to have brought an Action upon the Caſe, but an Aſſiſe of Nuſance, in Regard the Inheritance is in Queſtion. And ſo upon the firſt Motion held divers of the Juſtices and Barons; and after divers Motions, and Conſideration had of the Books of 5 *Eliz. Dyer* 11. *H.* 4. 2 *H.* 4. and others, they reſolved, That the Action was well brought; for he hath Election to bring either the one or the other. For altho' there hath a Difference been taken, where the Way is ſo ſtopped up that he loſeth the Uſe thereof altogether, and thereby his Common; there an Aſſiſe ſhould lie: But where he is eſtopped but in Part, and not totally, that there an Action upon the Caſe lies, and not an Aſſize. They conceived it not to be any Difference; for he hath Election to have either the one or the other Action; eſpecially as this Caſe is, where it appears not that the ſtopping was made by him, who is the Tenant of the Freehold, but it might be done by a Stranger, who hath nothing to do with the Land, or by one who hath but a Term therein; wherefore they all reſolved that the Action was well brought; and thereupon

Caſe lies for ſtopping a Way, as well as an Aſſize.

upon the Judgment was affirmed. 1 Cro. 845. *Cantrell v. Church.* See 1 *Croke* 466. *Alston v Pamphlyn.* See *Noy's Rep.* 112. *Gamford v. Nightingale*; yet besides the Case in *Dyer* cited above, 'tis held in 3 *Leon.* 13. *Anonymus*, which Case is reprinted *verbatim* in 4 *Leon.* 167, & 224. that in this Case an Assise, not an Action on the Case, ought to be brought; but I conceive the Law to be otherwise understood now, and many Instances occur also in our Modern Books, where the same Exceptions have been taken to Actions on the Case for disturbing the Plaintiff of his Common (which stands upon the same Reason as this does) and have been constantly over-ruled. *Style* 164, &c.

To prescribe for a Way *pro quibusdam averiis*, is naught.

In an Action on the Case for a Nusance in stopping a Way, the Plaintiff declared, That he had a Way *pro quibusdam averiis suis*; after Verdict for the Plaintiff, Judgment was staid for the uncertainty of the Words, *pro quibusdam averiis suis.* 1 *Leon.* 236. *Martingdal versus Andrew.*

Tenants in Common shall join in an Action on the Case for a Nusance.

In an Action upon the Case for a Nusance erected; it was resolved *per totam Curiam*, Where a Nusance is made to the Land of two Tenants in Common, that they shall join in an Action; for it is Personal, and concerns the Profits of the Land; and as they shall join in Trespass, so they shall join in this Action: But in forging a false Deed they shall sever; for that concerns the Inheritance of the Land. It was also held, That for a Nusance erected in the Name of the Devisor, and continued afterwards (as this Case was) the Devisee shall join in the Action; for the Continuance thereof is as the new erecting of such a Nusance. 2 *Cro.* 231. *Some v. Barwick.*

Tho' the Nusance was erected before the Common began, and continued afterwards.

Action

Whether Case may be brought for a Nusance, and what shall be a special Damage to maintain an Action for stopping a Way.

Action upon the Case, whereas there had been a Way within the City of *Canterbury*, leading from St. *Peter's-Street* unto a Street call'd *Rushmarket*; and that the Inhabitants of the City had used, Time whereof, &c. to pass that way, and that the Plaintiff was an Inhabitant there; that the Defendant had made a Ditch, and erected a Pale cross that Way, whereby he had lost his Passage, &c. The Defendant pleaded Not Guilty: And by a Visne awarded of *W.* in the County of *Kent* by Assent of the Parties (in Regard the Cause concerned all the Inhabitants of *Canterbury*) it was found for the Plaintiff: And now moved in Arrest of Judgment, That it was a Mis-trial, First, Because it ought to have been by a Visne of *Canterbury*. *Vide* 21 *Ed.* 4. 31. *Dy.* 299. But the Court held it to be well enough, because it was by Assent of the Parties, which is entred upon Record. *Et consensus tollit errorem. Vid.* 44 *Ed.* 3. 6. 44 *Ass.* 4. *Dy.* 397. And *Fenner* cited the Lord *Cromwell's* Case to be adjudged, That an Issue tried by another Jury than it ought to be, yet being by Assent, was well enough. Secondly, It was moved by *Coke*, Attorney General, That this Action lies not for a private Person, because it is a Common Nusance, and is punishable in the Court-Leet only, unless he can shew some Prejudice; as 27 *H.* 8. 27. is, and so it was adjudged in this Court between Serjeant *Benlow* and *Kemp*, That he might maintain an Action upon some Special Prejudice. And at *St. Albans* Term, between *Williams* and *Johns*, it was adjudged, That where a Chapel was not within a Manor, and the Parson of the adjoining Church used to read Divine Service every

every *Sunday*, for the Lord and his Tenants, in the said Chapel; and for that the Parson had failed therein, the Lord brought an Action upon the Case, and adjudged that it lay not; for so every one of the Tenants might bring the like Action, which would be inconvenient, that he should be liable to all their Actions: But he ought to be punished by the Ordinary in this Case: But peradventure, where there is not any other Remedy to be had, than by Action, there every one may have his Action, who is grieved: And therefore it was adjudged between *Westbury* and *Powell*, where the Inhabitants of *Southwark* had a Common Watering-place, and the Defendant had stopped it; 'Twas adjudged that an Action on the Case lay. But it is here punishable in the Leet, wherefore, *&c.* And of that Opinion were *Popham*, *Gawdy* and *Fenner*, That without a special Grief shewn by the Plaintiff, the Action lies not. But *Clinch*, *e contra*; for the Stopping of itself is a special Prejudice to the Plaintiff, that he cannot go that Way. Wherefore it is Reason he should maintain the Action. *Sed adjourn'*. *Co. Lit. fol.* 56. 1 *Cro.* 664. *Fineux verſ. Hovenden.*

How to prescribe for a Way.

In a Declaration for Nusance in stopping a Way, tho' the Way be appurtenant to a House; the Plaintiff in his Declaration shall never allege a Way to be appendant or appurtenant to a House, because it is only an Easement, but no Interest; otherwise of Common, which is an Interest. Adjudged on special Verdict. *Telv.* 159. *Godfrey v. Frith.*

In

In an Action on the Case for a Nusance in stopping of a Way; the Plaintiff by his Declaration entitled himself to the Way by a Custom, whereas he ought to have claimed it by Prescription; and for that Cause the Court held the Declaration to be naught. *W. Jones* 376. *Baker v. Bearman.*

A Way must be claimed by Prescription, not by Custom.

In an Action on the Case for stopping a Way: 'Twas moved in Arrest of Judgment, That it did not appear in the Declaration to what Village the Common Way led to. And *per Cur'*, It is a good Exception; but if it had been unto a Common Way there, or in such a Village, it had been good. 1 *Brownl.* 6. *Allyns v. Sparks.*

The *Terminus ad quam* the Way leads must be set forth in the Declaration.

The Plaintiff declared for a Way *in & trans peciam pasturæ*; and after Verdict Judgment was staid, because *pecia pasturæ* in uncertain. *Lutw.* 124. *Jones ver. Hammond.*

If it be laid to be *usq; ad Commun'* 'tis good, because it shall be intended a Common Field; but if it is *usque ad Clausum*, 'tis ill, unless the Plaintiff also shew in his Declaration what Interest he had in the Close. *Latch* 160. *Parker v. Newsham.* See *Noy* 86.

Case for a Publick Nusance by one who had received a particular Damage.

Action upon the Case for laying in the Highway in *Coggeshall*, leading from *Coggeshall* to *Braintree*, divers Loads of Logs, whereby they much straitned the Highway, so as the Plaintiff upon the Evening of such a Day, riding on the said Way, his Horse stumbled upon these Blocks, and much hurt him; for which, *&c.* The Defendant confesses it to be an Highway, but he saith, That the Town of *Coggeshall* is an antient Vill, wherein all the Inhabitants there, having ancient Houses, used Time whereof, *&c.* to lay Logs in waste Places of the said Way, before their Doors,

Plea not good.

for their Fuel, leaving ſufficient Paſſage for Chariots, Horſemen, and Footmen; and that he was ſeized in Fee of an ancient Houſe, and laid Logs for his Fuel in waſte Places of the Highway, leaving ſufficient for Paſſage of Chariots, Horſemen and Footmen, *&c.* and the Plaintiff riding by the Highway, *improvide* turned his Horſe upon the Blocks, and fell, *&c.* Whereupon the Plaintiff demurred; and without much Argument, it was adjudged, Firſt, That the Action will lie for the Plaintiff, becauſe he having ſpecial Damage, had Cauſe to bring that Action, altho' the Nuſance be a publick Nuſance. 27 *H.* 8. 27. Co. 5. 73. *Williams*'s Caſe. Secondly, That the Preſcription to make a Nuſance is not good; for it is againſt Law to preſcribe in ſuch Manner. Thirdly, This Preſcription for the Inhabitants is not good; wherefore it was adjudged accordingly. 2 *Cro.* 446. *Fowler ver. Sanders.* *Moore* 180. *Noy* 120. *Stone verſus Wakeman.*

In an Action on the Caſe, and declares, That whereas the Plaintiff being ſeized of an Houſe in *D.* in the County of *L.* and ſhews the Eſtate, *&c.* and preſcribes to have a Croſs-way in, by, and through a certain Way in *Sale* in the County aforeſaid, into ſuch a Cloſe in *D.* in the ſaid County; and that the Defendant made a Hedge in the Cloſe of *D.* in the ſaid County, and did ſtop up his Croſs-way, *per quod actio accrevit*; and upon *Non Cul*, it was found for the Plaintiff, and in Arreſt of Judgment, Exceptions were taken to the Declaration.

First,

First, Becauſe to preſcribe to have a Croſs-Path in a certain Way, that ſhall be intended to be a Common Croſs-way, that being in Common Right, Preſcription is gone. The Court on the contrary; for tho' a Man cannot preſcribe in a Common Croſs-way, yet to have a Way in, by, and thro' that Common Croſs-way, is otherwiſe, for that is croſs, thwart and thro' the Croſs-way; and then notwithſtanding, that being in the High-way, may continue his Courſe without Preſcription; yet it may be that the Croſs-way be incloſed and hedged on both Sides, and for that to preſcribe to paſs croſs, and repaſs thro' is a good Preſcription.

Secondly, the croſſing and going through the Croſs-way, is only ſhewing the Continuance of the Croſs-way, unto ſuch a Cloſe to which the Plaintiff claims a Way, *ergo* good; there the Declaration is not good, becauſe the Village, nor the County where *B.* Acre lies, and to which the Way ſhould lead, is alledged. Court on the contrary; becauſe the Village and the County is alledged where the Nuſance is done, for that only is the Cauſe of the Declaration, to which he hath pleaded Not Guilty, and upon that the Iſſue is joined, and thence the Viſne ſhall come; but if the Iſſue had been joined upon the Preſcription of the Croſs-way, or the Right of that, the Viſne ſhall come from both Villages (*viz.*) where the Houſe is, and out of the Village where the Cloſe lies to which the Croſs-way leads, and then the Plea had been ill for the Incertainty of the Village or County where *B.* Acre lies. *Noy.* 9. *Paul Banning*'s Caſe.

Caſe for ſtopping a way, how Inhabitants are to preſcribe.

In an Action upon the Caſe, the Plaintiff declared, That he is an Inhabitant in *D.* the Vill of *D.* and that all the Inhabitants there, Time out of mind, *&c.* had a Way to the Common, *&c.* and the Defendant ſtopped it, *&c.* And it was moved by *Maſſy* after Verdict, in Arreſt of Judgment, That Inhabitants cannot preſcribe but by way of Uſage; and he hath not alledged Title to the Common. *Egerton*, Solicitor, Inhabitants cannot preſcribe for Matter of Intereſt, but for an Eaſement they may; and the Plaintiff need not make a Title, becauſe the Action is only for the Diſturbance of the Way; and that the Inhabitants may preſcribe for an Eaſement, he relied upon 2 *Ed.* 4. 5. and 24 *Ed.* 4. 29. but to Profit or Commodity in the Freehold of another, they cannot preſcribe. 7 *Ed.* 4. 26. 18 *Ed.* 4. 3. *Gawdy*, There is no Difference, but it both Caſes they ought to alledge an Uſage. 2 *Mar. B. Preſcript.* 100. 6 *&* 7 *Ed.* 6. *Dyer* 71. 18 *Ed.* 4. 3. *Wray contra. Et adjournatur.* 1 *Cro.* 180. *Foxal v Venables.*

Caſe for ſtopping a Foot-way belonging to a Houſe.

How to preſcribe in Right of a Corporation.

Action upon the Caſe; ſuppoſing that the Governor, and the Poor of the Hoſpital of *the Holy Trinity*, in *Greenwich*, of the Foundation of *Henry* Earl of *Northumberland*, were ſeiſed of an Houſe in the Pariſh of St. *Martin's in the Fields*; and that he, and all thoſe whoſe Eſtate in the ſaid Houſe, *&c.* have had a Foot-way from the ſaid Houſe, unto the River of *Thames* in the ſame Pariſh, and let the ſaid Houſe to the Plaintiff for Years; that the Defendant erected a Gate croſs the ſaid Way, in the ſaid Pariſh, *&c.* Upon Not Guilty pleaded, and found for the Plaintiff, it was moved in Arreſt of Judgment, That the Declaration

claration was not good; becauſe it is ſhewn that the Corporation, and all thoſe whoſe Eſtate, &c. have had, &c. whereas a Corporation cannot preſcribe but in him and his Predeceſſors. Alſo one cannot ſhew a *Que eſtate*, without ſhewing how by Deed; for they cannot have it without Deed; and of that Opinion was *Doderidge*, Chief Juſtice; but the other three Juſtices againſt him, becauſe the Action is brought by the Leſſee for Years, who hath not the Deed; and it is but a Conveyance to the Action, which is grounded upon the Diſturbance done unto him in Poſſeſſion. But if he had claimed Rent or Common in Groſs, which cannot paſs without Deed, it had been otherwiſe; for there he could not ſhew *Que Eſtate*, without ſhewing the Deed how he came by the Eſtate; wherefore it was adjudged for the Plaintiff. 2 *Cro.* 673. *Slackman v. Weſt.*

How to preſcribe for a Way belonging to Land in Right of a Corporation.

Cantrel brought an Action upon the Caſe againſt *Stephens*, for ſtopping his Way in a Meadow called *Madbrook* in the Pariſh of *Redriff* in *Kent*: Upon Not Guilty pleaded, and a Verdict found for the Plaintiff, it was moved in Arreſt of Judgment, That the Plaintiff, as Leſſee to the Haberdaſhers Company of *London*, claimed to have a Way for them, whereas they having let the Land, cannot have the Way, but the Leſſee in Poſſeſſion. 2ndly, The Preſcription is not rightly applied; for it ought to be for them to have a Way *pro tenentibus & occupatoribus ſuis*, which is not ſo here. *Twiſden* anſwered, It ſhall be intended Tenants and Occupiers to the Haberdaſhers, tho' it be not ſaid *ſuis*. *Latch* ſaid, That a Preſcription *per que Eſtate* is good in an Action upon

upon the Caſe, becauſe no Land is claimed. And *Green*, on the other Side, ſaid, The Exception taken was helped by the Verdict. *Wyld*, on the other Side, ſaid, That it doth not appear that the Tenant, who brings the Action, comes in by the Haberdaſhers who claim the Way, and ſo he cannot preſcribe to have it, and the Preſcription ought to be laid *pro tenentibus & ſubtenentibus*, which *Rolle*, Chief Juſtice, denied, and ſaid, That it is ſaid that the Haberdaſhers were ſeized in Fee *& poſtea hucuſque*, and ſo they have the Fee at the Time, and may preſcribe; but it had been better for the Party to have ſhewed that he was their Tenant; but it being after Verdict, the Queſtion is, Whether it be not helped? Upon reading the Record, *Rolle*, Chief Juſtice, obſerved, That it appeared not whoſe Occupier and Tenant the Plaintiff is, but only by way of Argument; but ſaid, the Queſtion is, Whether the Verdict do help it? And he inclined, it did not, becauſe the Action is brought by the Tenant, who hath not entitled himſelf to the Action; for he hath made only a Title to the Way in the Haberdaſhers; but hath derived no Eſtate from them to himſelf. At another Day, *Rolle*, Chief Juſtice, ſaid, We muſt not take Things by Intendment; and here is a Failer in the very Gift of the Action; for the Plaintiff hath not entitled himſelf to the Action; for he hath no Intereſt; for it appears not how he is Occupier of the Land; for he doth not ſay he is *Occupator ſuus*; and as he hath laid the Declaration, the Company ought to have brought the Action. *Ferman*, Juſtice, to the ſame Effect, and ſaid, That upon a Demurrer

it

it had been clearly naught, and the Verdict here doth not help it; for no Title appears for the Plaintiff; for the Verdict cannot give him what he had not before. *Nicholas* and *Ask*, Juſtices, to the ſame Effect. *Rolle*, If it had been *Occupator ſuus*, I doubt it would not make the Declaration good, becauſe it ſhews not by what Title; ſo the Rule was *Nil capiat per billam niſi*. *Style* 300. *Cantrell* againſt *Stephens*.

Caſe for ſtopping a Way, how to preſcribe and lay the Venue.

Action upon the Caſe, and declares, Whereas he and all thoſe, *&c.* have had a Way from his Houſe in *D.* over *Green-acre* in *S.* and over *Black-acre* unto ſuch a Place in *P.* that the Defendant had ſtopped his Way in *S.* and upon Not Guilty pleaded, it was found for the Plaintiff; and it was alledged in Arreſt of Judgment, That the Declaration was not good, becauſe he alledged not in what Vill *Black-acre* was; for if the Preſcription be traverſed, the *Venire Facias* ſhall be from every Vill where the Land is, over which the Way lies, and ſo it was adjudged in 33 *Eliz. Haukhurſt*'s Caſe, in the Common Bench; wherefore, *&c.* *Gawdy*, It is clear, that this is a Fault for which the Defendant might have demurred; for true it is, he ought to have alledged all the Lands thro' which he is to have his Way, and Vills where they lie; and if the Preſcription be traverſed, the *Venire* ſhall be from every Vill. But now when he pleads Not Guilty, the *Venire* ſhall be from the Vill where the Stopping is alledged; for the Way is not principally in Queſtion, but it ought to be proved upon the Evidence; and thereto all the Judges agreed; therefore it was

was adjudged for the Plaintiff. 1 *Cro.* 427. *Bragg v. Banning.*

In Caſe for ſtopping a Way, the Plaintiff need not ſhew he would have uſed it if not ſtopped.

In Caſe for ſtopping a Way, the Plaintiff declared, That the Defendant had ſtopped the Way which he had a Right to uſe when he pleaſed. After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Plaintiff had not ſet forth in his Declaration that he would have uſed the Way after it was ſtopped; but the Court over-ruled the Exception, and the Plaintiff had Judgment. 2 *Bulſt.* 121. *Collicum v. Tucker.*

An inſufficient Preſcription aided by Verdict.

After Verdict for the Plaintiff in an Action of the Caſe for ſtopping a Way, 'twas moved in Arreſt of Judgment, That the Plaintiff had not ſet forth in his Declaration that the Houſe whence the Way led was *domus antiqua.* 2dly, For that it was alledged to be a Way from the Houſe to the Highway, without ſhewing what Highway; but the Court was of Opinion that theſe Defects in the Declaration were helped by the Verdict; ſo the Plaintiff had Judgment. *Latch* 111. *Harriſon ver. Peek. S. C. Palm.* 410. *S. C.* 3 *Bulſt.* 334.

Of the Evidence in Caſe for a publick Nuſance.

In Caſe for a Nuſance in the Highway, *per quod* his Gelding was hurt; the Evidence was, That the Servant was driving his Maſter's Gelding, and that 'twas hurt, as in the Declaration. To this Evidence the Defendant demurred, becauſe it did not prove that there was ſuch a Way, nor who cauſed the Nuſance; and *Rolle*, Chief Juſtice quaſhed the Verdict, and awarded a *Venire Facias de Novo. Style*, 335.

In

In Error of a Judgment in the Queen's Bench, in an Action upon the Case for cutting down the Bank of a River, whereby his Meadow adjoining was surrounded. The Defendant justifies by Prescription, for the Reparation of his (the Defendant's) Mill; and thereupon the Plaintiff demurred, and adjudged against him, that the Prescription was good, and the Manner of Pleading. And now Error thereof brought; and the Error assigned for the Manner, *(viz.)* Because he prescribes to cut down the Banks between the River that runs to the Defendant's Mill, and the River called *Old Charwell*, and saith, that he cut down the Banks of the said River, and saith not between the *Old Charwell*, and so not pursuant to the Prescription; and it was holden to be an incurable Fault. But it was moved, That the Declaration was not good; for that he declares, that he is Lessee at Will of Lands, and averreth not the Life of the Lessor. *Sed non allocatur*, because the Declaration is, That by Virtue of the said Lease, at the Time of the cutting, and of the Action brought, he was possessed, whereby is necessarily to be implied, that the Lessor was alive. Wherefore the first Judgment was reversed, and the Record remanded; and the Court of Queen's Bench, against their former Judgment, awarded a Writ of Enquiry of Damages. 1 *Cro.* 746. *Winchcomb versus Shepheard.*

Case for cutting a Bank, per quod his Close overflowed.

How to prescribe.

Judgment reversed for Fault in the Declaration.

Feoffee shall have an Action on the Case for a Nusance erected before his Time, and continued after; but the Action shall be brought only for the Continuance of the Nusance. *Moore* 599. *Baswick v. Omuden.* See *Moore* 353. 1 *Cro.* 402, & 420.

Case lies for the Continuing a Nusance.

After

If Error after a Recovery for the erecting it.

After a Recovery in an Action upon the Caſe for erecting a Nuſance, the Plaintiff may have another for the continuing it; but can never have another for the Erection. *Salk.* 10. *Johnſon v. Long.*

SECT. II.

Of Nuſances to Houſes.

Four Things conſiderable in a Houſe. Nuſances to 3 will bear an Action.

IN a Houſe four Things are conſiderable, 1. *Delectatio Inhabitantis.* 2. *Habitatio hominis.* 3. *Neceſſitas luminis.* 4. *Salubritas aeris.* 9 *Coke* 58. *Aldred's* Caſe. For any Nuſance to the firſt no Action lies, being Things of Pleaſure; but for a Nuſance to any of the other three, the Sufferer may maintain an Action. *Ibid.*

Caſe lies for erecting a Smith's Shop.

An Action on the Caſe was brought for erecting a Smith's Shop, and exerciſing the Trade of a Smith, *per quod* the Plaintiff could not be at reſt in his Houſe; and it was adjudged that the Action lay. *Lut.* 69. *Bradley v. Gill.*

Action for *Non feaſance*, *per quod* the Plaintiff's Houſe became uninhabitable.

In an Action on the Caſe, the Plaintiff declared, That he was poſſeſſed of a Meſſuage, and in a Cellar, Part thereof, was wont to lay Coals, Beer, *&c.* That the Cellar joined to the Defendant's Meſſuage, and by a Wall which the Defendant *debuit raparare*, was ſeparated and defended from the Defendant's Privy; and that for Want of Repairing this Wall *Fœditates & ſordida furicæ pred' in Cellarium ipſius Quer' fluebant*, &c. There was Judgment by Default and Damages upon the Writ of Enquiry. And upon a Motion in Arreſt of Judg-

Judgment, *Holt*, Chief Justice, was at first of Opinion, That the Defendant being a Tertenant, the Plaintiff could not put a Charge upon him, without shewing a special Title. But afterwards he gave Judgment for the Plaintiff. The Reason was, because it was the Defendant's Wall, and the Defendant's Filth, and he was bound of common Right to keep his Wall so as his Filth might not damnify his Neighbour, and that it was a Trespass on his Neighbour; as if his Beasts should escape, or one should make a great Heap on the Border of his Ground, and it should tumble and rowl down upon his Neighbour's. That the Case might indeed probably be such, That the Defendant might not be bound to repair, as if the Plaintiff made a new Cellar under the Defendant's old Privy, or in a vacant Piece of Ground which lay next the old Privy before; in such Case the Plaintiff may defend himself; but that cannot by the Case here, for then he could not be bound to repair; and upon the Words *debet reparare*, he must be acquitted upon the Trial. But on the other Side, If *A* has two Houses, and the House of Office of the one is contiguous to the Cellar of the other, but defended by a Wall, and he sells this House with the House-of-Office, the Vendee must repair the Wall; so if he keeps this, and sells the other, he himself must repair the Wall of the House of Office; for he whose Dirt it is must keep it, that it may not trespass. *Salk.* 360. *S. C. Mod. Ca.* 311.

Reginold

Trin. Term, 7 *Jac. Reg. Rot.* 1490. in the King's Bench, the Pleading of this Case see in the new Book of Entries, *fol.* 20, 21.

Reginold Hughs, an Attorney of the King's Bench, being seized in his Demesne as of Fee, of an ancient House in the Parish of *St. Olave's*, in the Ward of *Queen-Hithe*, *London*; in the South Part of which House have been three ancient Lights, Time out of Mind, *Anthony Keene*, having taken a Lease for 31 Years, from the Rector and Guardians of the Parish of St. *Michael* at *Queen-Hith*, by Indenture, of a ruinous House, and Yard next adjoining to the said House, with a Covenant to bestow 100 Marks at the least, upon the Repairing or New-building of the said House, and doth build a new House in the Place where the old House stood; and likewise upon the Yard, whereby the three ancient Lights on the South Side of *Lewes's* House are stopped up. Whereupon *Reginold Lewis* doth bring his Action upon the Case against *Anthony Keene*, for the stopping up the Lights; unto which the said *Anthony* doth plead a special Plea in Bar, shewing the Ruinousness of the House, and likewise the Lease made by the Rector and Guardians, and the Covenant comprised within the Lease; and doth also shew, that there is a Custom in *London*, that if one have an ancient House, wherein there are ancient Lights, and one other hath a House adjoining to that House, he that hath the adjoining House may well enough enhance his House, or build an new House upon his Ground, and to stop those ancient Lights of the House next adjoining, unless there be some Writing to the contrary; and he doth also averr *in facto*, That there was no Writing to the contrary; and that he, according to the Custom, did take down the old House and build a new one upon

upon the ſame Foundation, and upon the Yard oppoſite to the ſaid Lights, whereby they are ſtopped; and upon this Plea in Bar, the Plaintiff demurreth in Law.

The Queſtions of this Caſe, are,

Firſt, Whether it be lawful for a Man to build a Houſe upon his own Ground, whereby the Lights of an ancient Houſe are ſtopped, there being no Cuſtom to enable him?

Secondly, Whether the Cuſtom of *London* will enable a Man to build a new Houſe from the Ground, where no Houſe formerly was, whereby he may ſtop the ancient Lights of his Neighbour's Houſe?

Thirdly, Where upon an ancient Foundation a Houſe may lawfully be enhanſed, ſo as it ſhall ſtop up the Light of the Neighbour's Houſe adjoining?

As to the Firſt it is clear, by the Opinion of Sir *Thomas Fleming*, Chief Juſtice of the King's Bench, Sir *Chriſtopher Yelverton*, Sir *David Williams*, and Sir *John Croke*, Juſtices of the King's Bench, That there being no Cuſtom, it is not lawful to erect a new Houſe upon a void Piece of Ground whereby the old Light of an ancient Houſe may be ſtopped up; for the Rule of Equity and Law, ſaith, *Utere tuo ut alienum non lædas*; and the Light which cometh by the Windows being an eſſential Part of the Houſe, by which he hath three great Commodities; that is to ſay, Air, for his Health, Light, for his Profit, Proſpect, for his Pleaſure, may not be taken away no more than a Part of the Houſe may be pulled down, Queſt. I.

Three Commodities of Light by a Window; Air for Health, Light for Profit, Pleaſure for Proſpect.

down, whereby to erect the next Houſe adjoining. And with this Reſolution agreeth the Caſe of *Eldridge*, reported by Sir *Edward Coke*, in his ninth *Report*, *fol.* 58. where he ſheweth the ancient Form of the Action upon the Caſe to be *Quod Meſſuagium horrida tenebritate obſcuratum fuit*; but if there be Hindrance only of the Proſpect, by the new erected Houſe, and not of the Air, nor of the Light, then an Action on the Caſe will not lie, inſomuch that the Proſpect is only Matter of Delight, and not of Neceſſity.

Coke 9 *Rep. Eldridge's* Caſe.

Vid. Hob. Rep. Robins of Barnes, 131.

Queſt. 2. As to the Second, it was reſolved by the Opinion of the aforeſaid Judges, That the Cuſtom of *London* will not enable a Man to erect a new Houſe upon a void Space of Ground, whereby the ancient Lights of an old Houſe are ſtopped up; for firſt the Owner of the old Houſe having Poſſeſſion of a lawful Eaſement and Profit, which hath been belonging unto the Houſe by Preſcription, Time out of Mind of Man, may not be preſcribed out of it by another thwarting Cuſtom, which hath been uſed Time out of Mind of Man, but the latter Cuſtom ſhall rather be adjudged to be void; and Preſcription againſt a Preſcription will never be allowed by the Law. 2. It may well be, that before Time of Memory, the Owner of the ſaid void Piece of Ground granted unto the Owner of the Houſe to have his Windows that Way, without any ſtopping of them, the which being done, and continued accordingly, hath begotten a Preſcription, the which may not be defeated by the Allegation of a General Cuſtom; and with this Reſolution doth agree a Caſe

Caſe adjudged, *Trin. 29 Eliz. Rot.* 253. in the King's Bench, where, upon an Action upon the Caſe, brought by *Thomas Bloond* againſt *Thomas Moſley*, for erecting a Houſe in the County of the City of *York*, whereby the ancient Lights of his Houſe were ſtopped up; the Defendant pleaded Cuſtom for the City of *York*, as there is here for the City of *London*; and adjudged that the Cuſtom was naught; whereupon the Plaintiff had his Judgment: But if the Houſes had been new erected Houſes, or otherwiſe Windows had been newly made Windows in that ancient Houſe, the Erection of that new Houſe upon that void Space of Ground would have been lawful, notwithſtanding that the Windows and Lights be ſtopped; for it ſhall not lie in the Power of the Owner of the ancient Houſe, by ſetting out his new Windows, to prevent him that hath the void Space of Ground from making the beſt Benefit of it.

Queſt. 3. A new Houſe, built upon an old Foundation, without Enlargement either in Longitude or Latitude, tho' never ſo high built, ſhall not be taken to prejudice the Neighbour.

As to the Third Point, it was conceived, That if the new Houſe be only erected upon the ancient Foundation, without any Enlargement either in Longitude or Latitude, howſoever it be made ſo high that it ſtoppeth up the Light of the old Houſe, yet he is not ſubject unto any Action; becauſe the Law authorizeth a Man to build as high as he may upon an ancient Foundation; and it is no Reaſon to foreclose a Man from making his Houſe convenient to his Eſtate and Degree, by building up higher, when there is no other Impediment but only ſome Windows which are built out over his Houſe. And agreeing to this ſeemeth the old Book of 4 *Ed.* 3. 153.

to

to be, where an Aſſiſe of Nuſance was brought for his erecting his Houſe ſo high, that the Light of the Plaintiff, in the next adjoining Houſe was diſturbed by it; and the Plaintiff, upon the Opinion of *Hale*, Chief Juſtice, did not proceed in the Aſſiſe, but let it fall to the Ground; but if the new-built Houſe exceeded the ancient Foundation, whereby that Exceſs is the Cauſe of ſtopping up of Light, then he is ſubject unto the Action of him whoſe Light is ſtopped up; as it may appear by 22 *H.* 6. 25. And in the Caſe at the Bar, Judgment was given for the Plaintiff, becauſe he had brought his Action for the building of a new Houſe, upon a void Piece of Ground, by which his Window was ſtopped up, and *Keene*, the Defendant, only juſtifieth by the Cuſtom, the Erection of the Houſe upon an old Foundation, and upon the void Piece of Ground, the which is not any Anſwer at all to that which the Plaintiff layeth unto the Charge of the Defendant. *S. C. Callth.* 1. *Telv.* 215. *S. C. Godb.* 183. *S. C. Bulſt.* 115.

Action upon the Caſe, for ſtopping up of 3 Lights *totaliter*.

A ſpecial Action upon the Caſe was there brought by the Plaintiff againſt the Defendant, for ſtopping up three ancient Lights, which had been there Time out of Mind, that the Defendant had ſtopped them up *totaliter*; *ad dampnum*. The Defendant pleads in Bar, and thereby doth confeſs the ſtopping of two of the Lights, and Part of the Third, and juſtifies; and afterwards takes a Traverſe in this Manner; *abſque hoc* that he ſtopped up the three Lights, *aliter vel alio modo*; and in his Juſtification he ſhews the Cuſtom of *London* to be this, That any one may build upon an

Juſtifies 2dly, the Cuſtom of *London*, and traverſe to the other.

an old Foundation, and upon his own Land, the which he had done, and ſo juſtifies. As to this Traverſe, Exception was taken, That this is no Anſwer at all unto the Declaration. *Williams*, Juſtice, The Plaintiff by his Declaration, hath here laid to your Charge, the ſtopping of three of his Lights, *totaliter*; and for the which he hath brought his Action; and your Traverſe here, as it is taken, with an *abſque hoc*, is no Anſwer at all to this Declaration; but you ought to have anſwered, Guilty or Not guilty, as to the Reſidue, and ſo you ought to have pleaded without taking any Traverſe at all; for where there are three Wrongs laid to be done, as in this Caſe, and the Defendant makes Anſwer, and ſo it is in this Caſe; here your Plea being, That you ſtopped two of his Lights *totaliter*, and this you have juſtified by the Cuſtom, by building upon an old Foundation, and the Third in Part, with a Traverſe taken, *abſque hoc quod aliter vel alio modo*; the *abſque hoc* here goes to the two Lights before-mentioned; and as to the Third in Part, this is no Anſwer at all; for that you ought to have pleaded Not guilty as to the Reſidue, and not to have taken a Traverſe; as to this, we know your Meaning, by your Saying, as to Part of the Third, this is no good Pleading; but you ought, as to this Third Part, to have pleaded Not guilty; and therefore for this Default in Pleading, Judgment was given by the Court for the Plaintiff. 1 *Bulſt.* 116. *Newall v. Barnard. S. C. Telv.* 295.

Exceptions to the Traverſe.

Judgment given for the Plaintiff.

Preſciption for Lights.

In an Action upon the Caſe for ſtopping of Lights, the Plaintiff declares he was poſſeſſed for many Years, without ſaying how many, and Time out of Mind, the Light came in at the Windows; and a good Form of Preſcription. 1 *Ven.* 248.

How to declare.

If a Man has a vacant Piece of Ground, and builds thereupon, and that Houſe has very good Lights, and he lets this Houſe to another; and after he builds upon a contiguous Piece of Ground, or lets the Ground contiguous to another, who builds thereupon, to the Nuſance of the Lights of the firſt Houſe; the Leſſee of the firſt Houſe ſhall have an Action upon his Caſe againſt ſuch Builder, *&c.* for the firſt Houſe was granted to him with all the Eaſements and Delights belonging to it. And it was agreed, That formerly the Way was to declare of ancient Lights and ancient Meſſuage, but now that was alter'd. *Vid.* the Caſe of *St. John v. Moody. per Cur'. M. Caſes*, 116. *Roſewell v. Prior.*

Note, In the Caſe of *Tennant* and *Golding*, *p.* 312. in the ſame Book, 'tis ſaid, That this Declaration was good only becauſe 'twas after the Verdict. *Sed Vid.* 1 *Ven.* 237, and 248. *Shower* 7. *S. C.* 4 *Mod.* 150. *Salk.* 360. 3 *Keble* 133.

In Caſe for ſtopping of his Lights: It was agreed by all the Juſtices, That if two Men be Owners of two Parcels of Land adjoining, and one of them do build an Houſe upon his Land, and makes Windows and Lights looking into the other's Land, and this Houſe and Lights have continued by the Space of thirty or forty Years; yet the other may, upon his own Land and Soil, lawfully erect an Houſe

or

or other Thing againſt the ſaid Lights and Windows, and the other can have no Action; for it was his Folly to build his Houſe ſo near to the other's Land: And it was adjudged accordingly.

Nota, *Cujus eſt Solum ejus eſt Summitas uſque ad Cælum. Temps Ed.* 1. 1 *Cro.* 118. *Pope v. Bury. S. C.* 1 *Leon.* 168.

When the Lights of another Houſe may be darken'd.

The Caſe was, *A.* builds a Houſe on his Land, and wills that to *B.* and ſells the adjoining Land to *C.* who, by erecting ſeveral Logs of Woods, obſtructs the Proſpect of one of the Windows; and the Queſtion on the ſpecial Verdict was, Whether he might do this? *Kelynge dubitavit, Hyde* abſent, *per Wyndham* and *Twiſden*, The Plaintiff ought to recover: 'Twas reſolved by them: *Firſt*, That if a Stranger has Land adjoining to a new-built Houſe, he may erect a Houſe, and tho' thereby the Windows are darken'd, there's no Remedy; otherwiſe of an ancient Houſe that has ancient Lights; becauſe of the Preſcription: And if the Land had been ſold firſt, the Vendee might have then ſtopt the Lights; *quod Twiſden negavit. Mich.* 16. *ſimile Judic. inter eoſdem. Sid.* 167, & 227. *Palmer v. Fleſhes. S. C. Raym.* 87. *S. C.* 1 *Lev.* 122.

Whether Caſe lies againſt one who was Tenant of a Houſe, by the erection whereof the Lights in the adjoining Houſe were ſtopped

Action on the Caſe: Whereas the Plaintiff, 1 *Sept.* 40 *Eliz.* was ſeiſed in Fee of a Meſſuage and Chamber in *Nundel*, and *Thomas Henſon* was then poſſeſſed of a little Shed adjoining to the ſaid Houſe; and at the ſaid 1 *Sept.* 40 *Eliz.* and from the Time whereof, &c. there was a Window in the ſaid Houſe looking towards the ſaid Shed, by which Window only, and by no other Means, the Light came into the Chamber of the ſaid Houſe; that the

ſaid *Thomas Henſon*, 30 *Sept.* 40 *Eliz.* erected a Building upon the ſaid Shed, ſo near adjoining to the ſaid Houſe, that it ſtopped up all the Light of the ſaid Window, ſo that he loſt all his Light; and that the Defendant the 1 *Sept.* 10 *Jac.* being poſſeſſed of the ſaid Building newly erected, had continued, and not amoved it from the ſaid Day of *Sept.* 10. *Jac.* until the Day of the Bill; *per quod Actio, &c.* The Defendant pleaded Not guilty, and found againſt him; and now moved in Arreſt of Judgment, That this Action lies not againſt the Defendant; for although an Action lies againſt him who erected it, (as it was agreed by all the Court) yet againſt the Defendant, who is only Leſſee for Years, and inhabits only therein, and hath committed no other Act to prejudice the Plaintiff, and who hath no Authority to abate it (but if he ſhould he would be chargeable in an Action of Waſte) the Action is not maintainable againſt him. And it is not like the Lady *Brown*'s Caſe, for the turning of a Cock; nor to a Penthouſe, which overhangs another Man's Court-yard; for the falling of every Shower of Rain is a new Nuſance: And if the Plaintiff ſhould have any Remedy, it ſhould be by a *Quod permittat*, againſt the Tenant of the Freehold: And to that Opinion *Coke*, Chief Juſtice, inclined, tho' the other Juſtices doubted therein; but afterwards it appearing that the Plaintiff had procured Judgment to be entred without Motion to the Court, the Defendant was put to his Writ of Error. *Vid.* 4 *Aſs.* 9 *Eliz. Dyer* 2 *Cro* 373. *Rippon v. Bowles.*

Action

Action upon the Caſe: Whereas the Plaintiff, upon the ninth of *October* 5 *Caroli*, was poſſeſſed of an ancient Houſe in *Worceſter*; and the Defendant, the 9th of *October* 5 *Car.* was, and yet is, poſſeſſed of another Houſe, and void Piece of Land adjoining to the North Part of the Plaintiff's Houſe; wherein were three Windows, Time whereof Memory, *&c.* by which Windows the Light came out of the ſaid void Piece of Land into the Plaintiff's Houſe, Time whereof, *&c.* That the ſaid Defendant maliciouſly, to deprive him of the Light coming to the ſaid Windows into his Houſe, the ſaid 9th of *October* 5 *Car.* erected a Building in Part of the ſaid void Piece of Ground, and thereby ſtopped the Lights coming by the ſaid Windows into his Houſe, whereby his Houſe is totally darkned, and he much prejudiced by that ſtopping. The Defendant pleaded Not guilty, and found againſt him. And Exception was taken in Arreſt of Judgment, That the Declaration is repugnant in itſelf; for to ſay *adhuc poſſeſſionatus* of the ſaid void Piece of Land, and to ſhew the Offence in erecting a Building upon it, ſhews that it is not now a void Piece of Land; and of this Opinion was *Berkely*: But *Richardſon*, *Jones*, and my Self, held that this is good enough, and no Repugnancy in the *adhuc poſſeſſionatus*; for it may be that Part of the ſaid void Parcel of Land is builded, and darkens his Light, and Part remains ſtill void; and the Declaration as to that, is but Surpluſage, and the one Part will ſtand with the other. Another Exception, Becauſe he alledgeth not any Perſon in whom the Preſcription may be fixed;

Caſe for ſtopping Lights.

Motion in Arreſt of Judgment for Repugnancy in the Declaration.

and the Plaintiff is but Leſſee for Years, who cannot preſcribe. But it was anſwered thereto, That the Time whereof, *&c.* there need not any Preſcription in any Perſon; wherefore it was adjudged for the Plaintiff. 3 *Cro.* 325. *Symonds verſus Seabourne.* *S. C. W. Jones,* 326.

Action on the Caſe for building and erecting and continuing a Nuſance with an *adhuc exiſtit.* *Et per Cur'.* Ill; becauſe that *adhuc exiſtit* is to the Time of the Declaration, and conſequently Damages demanded for what accrued after the Action brought, if in inferior Court, becauſe the Plaintiff continued here by Bill. *Show.* 366. *Carter v. Coltrope.* *S. C.* 3 *Leon.* 345. *S. C.* 4 *Mod.* 150.

Caſe by Inn-holder for erecting a Tallow-Furnace next his Inn.

Action upon the the Caſe, whereas the Plaintiff is Owner of a Common Inn in *Eaſt Geſtock*, that the Defendant maliciouſly erected a Tallow-Furnace, and boiled therein much ſtinking Tallow, to the great Annoyance of him and his Gueſts: And by Reaſon of ſuch Stench, ariſing thereupon, many of his Gueſts left his Houſe, and many of his Family became unhealthful; upon Not guilty pleaded, and found for the Plaintiff, *Germyn*, Serjeant, moved in Arreſt of Judgment, That an Action lies not; for he being a Tallow-chandler, ought to uſe his Trade, which cannot be ſaid to be a Nuſance. But all the Court held, That as the Declaration is penned, the Action is maintainable; for every one ought *ſic uti ſuo, quod alienum non lædat.* Then when the Plaintiff is an Inn-keeper, the Defendant erecting a Tallow-Furnace, annoy'd his Houſe with Stenches, eſpecially by boiling ſtinking Stuff: And ſo in the Caſe of *Sobayle*, who erected

erected a Tallow-Furnace croſs the Street of *Denmark-houſe* in the *Strand*, it was found a Nuſance upon the Indictment, and adjudged to be removed: Whereupon Judgment was here given for the Plaintiff. 3 *Cro.* 510. *Morley v. Pragnell.*

The Plaintiff alone brought an Action on the Caſe againſt the Defendant, and ſets forth, That he and his Wife, in her Right, was ſeized of a Meſſuage, Bake-houſe and Coal-yard, *&c.* and that the Defendant had erected two Houſes of Office ſo near the ſaid Bake-houſe, that the Wall became foundrous, and the Air ſo unwholſome, that he loſt his Cuſtom; and that the Defendant had digged a Pit ſo near the Coal-yard, that the Walls thereof were in Danger of falling; and that he had built another Wall ſo near the ſaid Meſſuage, that he had ſtopped an old Light therein; upon Not guilty pleaded, there was a Verdict for the Plaintiff. The Court held, That where the Action (if not diſcharged) ſhall ſurvive to the Wife, they ought both to join; which if they had done here, it would have been hard to have maintained this Action, becauſe intire Damages are given; and for loſing this Cuſtom to this Bake-houſe, the Husband alone ought to have brought the Action; he may bring an Ejectment of the Lands of his Wife; but Judgment was ſtaid, till moved on the other Side. 2 *Mod.* 269. *Froſdict ver. Sterling.*

Caſe lies for erecting a Houſe of Office, *per quod* the Plaintiff's Wall became foundrous; but whether the Feme ſhould have joined *Quære.*

'Twas adjudged on Motion in Arreſt of Judgment, That an Action on the Caſe lies for the erecting a Hogſty ſo near a Houſe that it was a Nuſance to it; ſo does an Action lie for the Erection of a Lime-Kiln, if by Reaſon of its Nearneſs to any Houſe,

Caſe lies for erecting a Hogſty or Lime-Kiln.

the Smoak of the Kiln comes in at the Windows. 9 *Coke* 59. *Aldred*'s Caſe. *Contra Lutw.* 91.

Caſe for the erecting of a Brewhouſe.

In an Action on the Caſe, the Plaintiff declared, That he was poſſeſſed of the Office of Regiſter to the Biſhop of *Gloceſter*, and of a Houſe in *Glouceſter* where he exerciſed the ſaid Office; that the Defendant was poſſeſſed of another, ſixteen Foot from his, and there did erect a Brewhouſe, and Houſe of Office; and that by Reaſon of the *horribiles & inſalubres vapores* that aroſe from them, he could not exerciſe his Office there, nor the Houſe; and that his Houſhold Goods were all ſpoil'd. After much Debate in this Caſe the Court reſolved that the erecting of a publick or a private Brewhouſe (and ſuch this was) was not of itſelf a Nuſance; but that if it be erected ſo near as to render another's Houſe uninhabitable, 'twas a Nuſance, but whether 'twas ſo in this Caſe the Court was equally divided; ſo no Judgment was given. *Pal.* 536. *Jones* and *Powell. S. C. Hutt.* 135.

SECT. III.

Containing ſelect Precedents of Declarations for Nuſances; and References to all the other Precedents of Declarations as are extant in the Law-Books.

Caſe pur obſtructer un' haut Chimin per que le pl't' eſt damnify.

SAmuel' Whitting Gen' queritur de T Greſly Bar' in Cuſtod' Bar', &c. pro eo videlt' q̄d cum a tempore cujus contrarii memoria hominum non

non exiſtit fuit & adhuc exiſtit quedam communis alta regia via ducens a villa de Roſſeton in Com̃ Derby p̃d̃ in per & trans' quandam parcellam terre vocatam le Mill-Lane apud Drack-low in Com̃ p̃d̃ verſus Willam de Burton ſup̃ Trent in Com̃ Staff. ac retroꝛſum a villa de Burton ſuper Trent p̃d̃ in per & trans' p̃d̃ parcell̃ terre vocat̃ le Mill-Lane in Com̃ Derb' p̃d̃ uſq; villam de Roſſeton p̃d̃ p̃o omnibus ligeis ſubdit̃ Dom̃ Reg' ad eandem villam de Roſſeton uſq; p̃d̃ villam de Burton ſuper Trent ac a villa de Burton ſuper Trent p̃d̃ uſq; villam de Roſſeton p̃d̃ per totum tẽpus p̃d̃ equitare ambulare & cum carectis carriagiis & averiis ſuis tranſire volentibus, cumq; etiam p̃d̃ Samuel decimo die Julii Anno Reg' Dom̃ Caroli ſecundi nunc Reg' Angl', &c. decimo nono tranſeuns & itinerans fuit cum averiis ſuis & vehiculo Anglice Waggon per eandem communem altam viam ducentem in per & trans' p̃d̃ parcell̃ terre vocat̃ le Mill-Lane p̃d̃ a villa de Roſſeton uſq; p̃d̃ villam de Burton ſuper Trent Quod quid̃ vehicul̃ Angl' Waggon onerat̃ fuit cum carbonibus. Et p̃d̃ Thomas p̃miſſor' non ignarus ſed machinans & malitioſe intendens ipſum Samuel' in hac parte minus rite p̃gravare ac ipſum Samuel' cum carriagio onerat̃ & averiis ſuis p̃d̃ in Communi alta regia via p̃d̃ in p̃d̃ parcell̃ terre vocat̃ le Mill-Lane p̃d̃ impedire eodem decimo die Junii anno decimo nono ſup̃d̃ Communem altam viam regiam p̃d̃ in p̃d̃ parcell̃ terre vocat̃ Mill-Lane p̃d̃ cum ſepibus poſtibus repagulis & Janua apud Drak-low p̃d̃ in Com̃ Derby p̃d̃ obſtupavit & obſtruxit & abtunc eundem Samuel' cum carriag' onerat̃ & averiis ſuis p̃d̃ in eadem communi alta

via

via regia in ꝓed parcell' terre vocat. le Mill-Lane ꝓed exiſtend eunt a ꝓed villa de Roſſeton ꝓed in Com' Darb' ꝓed uſq; villam de Burton ſuper Trent in eodem Com' Staff. per ſpacium trium mille paſſium regredi compulit ita quod idem Samuel illam communem altam viam regiam tunc & adhuc habere & uti non potuiſſet ſed ꝓed Samuel' adtunc in itinere ſuo cum carriag' oneratis & averiis ſuis ꝓed multipliciter retardatus fuit & averia ꝓed Samuel ꝓed ea occaſione multo labore maxime verata & deterioꝛata fuerunt unde idem Samuel' dicit quod ipſe deterioꝛat' eſt & dampnif habet ad valenciam viginti lib' Et inde, &c. Vidian p. 42.

Brieſe de Privilege per le Clerk d'un Proth'.

Wigonr' ff JOhannes Gill attach fuit per breve Dom' Reg de privileg e Cur' hic emanan' ad reſpondend Joſhuæ Bradley Gen' un' Clericor' Willielmi Tempeſt, Ar' unius Prothon' Cur' Dom' Reg de Banco hic apud Weſtm. in Com' Middſſ. juxta libertates & privileg eſudem Cur' p huiuſmoi Prothon' eorum Cler' & al' Miniſtris de eodem banco a tempore cujus contrarii memoria hominum non exiſtit hactenus uſitat & approbat in eodem de placit' trans' ſuper caſum, &c. & unde idem Joſhua in ppr' ꝓſona ſua queritur quare cum idem Joſhua

Narr' per Nuſans per erection. d'un *Smith's Shop* proche al Meaſon de pl. per quod, *&c.*

decimo die Maij anno Regni Regis nunc tertio & antea fuiſſet & adhuc exiſtit ſeiſit de & in uno capitali meſſuag' cum pertin in Stowebridge in Com' ꝓed in dominico ſuo ut de feodo cumq; ꝓed Johannes ꝓed decimo die Maij anno tertio ſupradict & temp poſtea uſq; diem impetrationis ꝓdict' breviſ ipſius Joſhue ſcilt viceſſim' quar' die Octob' anno tertio ſupradict & poſtea occupavit & habuit in occupatione & poſſeſſione ſuis ut al' meſſuag cum pt'in in Stowebridge ꝓed meſ-

ſuag'

ſuaꝫ ipſius Joſhuæ pꝛeꝺ contigue aꝺjaceꝫs pꝛeꝺ Johannes machinanꝫs & malitioſe intenꝺens ipſum Joſhuam multiplicit̃ ꝓgravare & ipſum ꝺe toto commoꝺo eaſiamenꝺ̃ uſu & pꝛoficuo totius meſſuaꝫ ipſius Joſhuæ pꝛeꝺ penit̃ ꝺepꝛivare ꝓꝺ ꝺecimo ꝺie Maii anno tertio ſupꝛaꝺict̃ apuꝺ Stowebridge pꝛeꝺ quanꝺ̃ Shopam fabꝛilem (Anglice a Smith's Shop) infra meſſuaꝫ ipſius Joſhuæ ꝓꝺ meſſuagio ipſius Joſhuæ pꝛeꝺ aꝺjacen̄ ꝺe novo erexit ac quoꝺ̃ fabꝛile (Anglice a Smith's Forge) infra eanꝺem Shopam locavit & affixit ac infra Shopam pꝛeꝺ in & ſuper fabꝛile illꝫ cum ſervis ſuis tempoꝛe nocturno ac tempoꝛe matutino ante lucem ꝺiei & aꝺ aꝫ tempoꝛa & hoꝛas intempeſtivas in tantum laboꝛavit & ꝺiverberavit & cum malleis Ferreis pcuſſit ita quoꝺ ꝑ hoꝛribiles ſtriꝺoꝛes clangoꝛes ſtrepitus & ſonitus laboꝛis & ꝺiverberationis illꝫ foꝛes romeas & partes pꝛeꝺ meſſuagii ipſius Joſhuæ penetrantes & influen̄) ꝺem Joſhua libeꝛt & famuli ſui ac aꝫ plene in meſſuagio ſuo pꝛeꝺ converſan̄ exiſten̄ in eoꝺem meſſuagio ipſius Joſhuæ ꝺoꝛmire quieſcere ſeu manere non potuer̃ nec poſſunt aꝺ intollerabil̃, incommoꝺitatem & nuſanc̃ ipſius Joſhuæ ꝓtertu cujus iꝺem Joſhua totum commoꝺum eaſiamenꝺ̃ & pꝛoficuum meſſuagii ſui pꝛeꝺ per totum tempus pꝛeꝺ ꝓꝺit & amiſit aꝺ ꝺamnum ipſius Joſhuæ ꝺucentarum liꝺꝛarum. Et inꝺe pꝛoꝺuc̃ ſectam, &c. Lutw. 69. Bradley v. Gill.

Middlſ. ſſ. MEmoꝛanꝺ Quoꝺ aꝫs ſcil̃ termino Paſche ultimo pꝛeterito coꝛam Doñ Reg̃ apuꝺ Weſtm. venit Robertus Tenant ꝑ Johannem Rice Attoꝛn ſuum. & pꝛotulit hic in Cur̃ ꝺicti Doñ Reg̃ tunc ibiꝺem quanꝺ̃ billam ſuam verſus Lucam Gouldwin in Cuſtoꝺ̃ Par̃ ꝺe placito tranſg̃ ſuper caſum Et ſunt pleg̃ ꝺe

Caſe for not repairing a Wall *per quod ſordes, &c. ex latrina ꝺef. in cellarium Quer' penetraverunt.*

de prosequend scil Johannes Doe & Richardus Roe Que quid billa sequitur in hec verba scil. Middlesex ff. Robertus Tenant queritur de Luca Gouldwin in Custod Mar' maresc. Dom̃ Regine existen̄ pro eo videlicet quod cum ipse idem Robertus primo die octobris anno Reg' Dom̃ Annæ nunc Reg' Angl. &c. primo & abinde semper hucusq; possessionat fuisset & adhuc possessionat existit de uno messuagio scituat. jacen̄ & existen̄ in Frith-Street in paroch sancte Annæ infra libertat Westm. in Com̃ Middss. pred̃ pro quodam termino annor' nondum finit ac in cellario suo parcell messuag' sui pred̃ reponere & conservare solebat carbon̄ ac illupulat. cervisie copias pro usu familie sue necnon ad vendend' & merchandizand diversis plonis que de ipso comoditat pred̃ emere solebant in messuagio suo pred̃ ad ipsius Roberti non modicum profic̃uum & utilitat Quod quidem cellarium contigue adjacet & per totum tempus pred̃ contigue adjacebat messuagio pred̃ Lucæ in parochia pred̃ & de fozica parcell pred̃ messuagii predat Lucæ reparari & vallari solebat per murum crallum & compactum qui ad dictum messuagium predat. Lucæ pertinet & p predat Lucam per totum tempus pred̃ de jure debuit reparari predat tamen Lucas premissor' non ignarus sed machinans & fraudulenter intendens ipsum Robertum in hac parte minus rite pregravare & ipsum Robertum de usu & commoditate cellarii messuagii sui pred̃ totaliter deprivare & de profic̃uo commercii sui pred̃ impedire eodem primo die Octob' Anno Regni dicte Dom̃ Reg' supradicto & abinde semper hucusq; murum pred̃ licet sepius requisit eundem reparare scilt per ipsum Robertum eodem primo die Octobr' in parochia pred̃ tam negligenter custodivit & reparavit quod ob defectum debite cure & reparation̄ ejusdem muri feditates & sordida

ſordida ſorice prēd de eadem ſorica per de-caſus & fraction' muri prēd in cellar' prēd eſuſd Roberti fluebant & cellarium prēd inundabant ſcil' in parochia prēd per totum tempus prēd p quod ipſe idem Robertus uſum cellarii ſui & pro-ficuum Commercii ſui prēd per totum tempus prēd perdidit & amiſit, unde idem Robertus di-cit quod ipſe deteriorat' eſt & dampnum habet ad valentiam centum libr', & inde producit ſectam, &c.

Et modo ad hunc diem ſcil' diem veneris pro-poſt craſtinum ſancte trinitatis iſto eod termino uſque quem diem prēd Lucas habuit licentiam ad billam prēd interloquend & tunc ad reſpondend, &c. coram Dom' Reg' apud Weſtm. venit prēd Robertus p Attorn' ſuum prēd Et petit quod prēd Lucas ad narrationem ſuam prēd reſpondeat. Et predict' Lucas licet ad eundem diem ſolempni-ter exact' non ven' nec aliquid dicit in barram ſive preclusionem actionis prēd Roberti prēd p quod idem Robertus remanet inde verſus eum indefens. Ob quod prēd Robertus dampna ſua verſus prefat' Lucam recuparare debeat, ſed quia Cur' dicte Dom' Reg' nunc hic coram ipſo Reg' incognit' exiſtit que dampna prēd Robertus occaſione pre-miſſor' in hac parte ſuſtinuit, Ideo precept' eſt vic' quod p Sacram' duodecim proborum & legal' hominum de balliva ſua diligent' inquirat que dampna prēd Robertus tam occaſione premiſſor' quam pro miſis & cuſtagiis ſuis per ipſum circa ſectam ſuam in hac parte appoſit' ſuſtinuit & in-quiſition' quam inde ceperit Dom' Reg' apud Weſtm. die Lune proxim' poſt tres' ſeptiman. ſancti Michaelis ſub ſigillo ſuo & ſigillis eorum per quorum ſacram' inquiſition' ill' ceperit mittat u-nacum brevi Dom' Regine ei inde direct' idem dies dat' eſt eidem Roberto ibidem, &c. 2 Salk. 766. Tenant verſus Gouldwin.

A Pre-

A Precedent of a Declaration for ſtopping Lights, from *Vidian* 40.

C. Briſtol. ſſ. RIchardus Jodes Ar' queritur de Johanne Danby in Cuſtod Mar', &c. pro eo videt' quod cum idem Richardus primo die Septemb' Anno Dom 1658. & ſemper poſtea hucuſque poſſeſſionat' fuit & adhuc poſſeſſionat' exiſtit de & in uno antiquo Meſſuagio cum pertin ſcituat' jacen & exiſten in Parochia Sancti Johannis Baptiſte in Civit' Briſtol in Com ejuſdem Civit' in quo quidem Meſſuagio eodem primo die Septembris Anno ſupradd a tempore cujus contrarii memoria hominum non exiſtit fuer' quatuor antiq feneſtre in parte Boreal' Meſſuagii pdict' p quas quidem quatuor feneſtras aer Saluberrimus & lumen exhilarans eodem primo die Septemb Anno ſupradd ac a toto tempore ſupradd intrabant & inferrebantur & intrare & inferri conſuever' & ſolebant in magnum emolumentum & Commoditat' inhabitantium Meſſuag pd Cumq pd Johannes pd 1 die Septemb Anno ſupradd & ſemper poſtea hucuſque poſſeſſionat' fuit & adhuc poſſeſſionat' exiſtit de quadam parcel' terre cum pertin ſcituat' jacen & exiſten in Parochia pred in Com Civit pred eidem Meſſuagio prope & contigue adjacen. Et ſic inde poſſeſſionat' exiſten idem Johannes machiñ & fraudulenter intendens eundem Richardum multiplicit' pgravare & ipſum Richardum de aere & lumine que Meſſuag' pred per feneſtras pdict' inferri & intrare conſueverunt & ſolebant & Meſſuag' pd horridis Tenebris obſcupare pdict' 1 die Septemb Anno ſupradd apud pred Parochiam Sancti Johannis Baptiſte in Civit' Briſtol pd in Com Civit' eſuldem

ejuſdem quodꝺ novum Pelluag' ſupꝑ pꝺ parcell' terre ipſius Johannis tam ꝓpe pꝺ antiquum Pelluag' pꝺ Richardi de novo Erexit & edificavit, Ita qꝺ p eand erect' pꝺ novi Pel. ipſius Johannis feneſtre pꝺ die & anno ſupꝛaꝺ & ſemꝑ poſtea uſqꝫ viceſſimum quartum diem Dec' anno Reg̃ Dom̃ Caroli ſecundi nunc Reg̃ Angl. &c. 12. multiplicit obſcurat & obſtupat fuer' ꝑ quod idem Richardus tot Comoditat & eaſſament pꝺ feneſtrar' & Juvamen & Saluꝺꝛitat aeris & luminis in & p eaꝺ feneſtras ut ꝓfert intrare & inferri conſuet a 1 die Sept anno Dom̃ 1658. ſupꝛaꝺ uſque pꝺ 24 diem Decemb anno 12. ſupꝛaꝺ totalit ꝓdit & amiſit Cumque etiam pꝺ Richardus poſtea ſcil 24 die Decemb anno 12 ſupꝛaꝺ & continue poſtea huculque poſſeſſ. fuit & adhuc poſſeſſion exiſtit de & in antiquo Pelluag̃ pꝺ cum pertin in quo antique feneſtre ut ꝓfert fuer'. Cumqꝫ pꝺ Johannes pꝺ 1 die Sept anno Dom̃ 1658. ſupꝛaꝺ apud pꝺ Paroch ſancti Johannis Baptiſte in Civit Briſtol' pꝺ in Com ejuſdem Civit pꝺ novem Pel. ſupꝑ pꝛeꝺ parcell' terre ipſius Johannis tam ꝓpe Pelluagium pꝛeꝺ Richardi pꝛeꝺ de novo ut pꝛefert erexiſſet & edificaſſet. Ita quod per eandem Erectionem pꝛeꝺ novi Pelluagii ipſius Johannis feneſtre pꝛeꝺ advtunc & ibiꝺ multipliciter obſcur' & obſtupate fuiſſent idemqꝫ Johannes machinans & malitioſe intendens ipſum Richardum ulterius pꝛegravare pꝛeꝺ novum Pelluagium ſic ut pꝛefertur erectum & edificatum a pꝛeꝺ 25 die Septemb Anno duodecimo ſupꝛaꝺ' uſqꝫ diem Exhibitionis huius Bille totaliter perdidit & amiſit unde idem Richardus dicit quod ipſe deterioꝛat eſt, &c.

Re-

References to the printed Precedents of Declarations,

Pur Diſturbance de Chimin.

Quer' ratione Dom'ii habuit communiam in villis certis temporibus quol't anno, & viam ad ducend' & reducend' averia; & def. fecit trencheas ex tranſverſo viam. R. Ent. 616. Wec. Intr. 197.

Quer' ratione tenuræ habuit Chiminum quod def. obſtruxit per levac' muri. 33 H. 6. 26. Dig. 187. Aſh. 15. Her. 207.

Pro inhabitan' parci de via ad villam obſtupat. per ſtipites fixos ad januam. 3 Bro. 45.

Pro inhabitan' villæ de via obſtupat' ducen' per Clauſa ad meſ' per ſepem erect'. Ub. 120.

D. ſeiſit' de meſ' & terris habuit viam pedeſtrem, equeſtrem, & pro carriagiis a meſ' & terris trans terras def. uſque parcum præd' D. D. dimiſit quer' pro vita & def. obſtupavit viam per incluſionem terrar'. Co. Entr. 11.

Quer' ſeiſit' de meſ' & 10 acr' terræ habuit viam a meſ' ad fontem pro aqua hauriend' & ad unam acr' terræ parcell' tenementorum in campo pro carriag' & fugac' averiorum trans 3 acras terræ Def. in quibus def. fecit trencheas ex tranſverſo viam. 1 Br. 197.

Quer' ſeiſit' de meſ' & clauſo terræ habuit viam a meſ' trans terras def. ad præd' clauſum & def. obſtupavit viam per erectionem domus. 1 Br. 200.

Quer' ſeiſit' de 18 acris terræ habuit viam a regia via uſque terras, & def. obſtruxit viam per portas & poſtes. Aſh. 16.

Pur

Pur Leſſee cl'i de via obſtruct' per erectionem poſtium & repagulorum. Her. 142.

Pur Leſſee pur ans, ubi Leſſor habuit viam pedeſtrem a meſ. trans clauſum def tam ad villam de W. quam ad fontem in clauſo & def fecit foſſat. trans maximam partem viæ, & erexit ſepem ſuperinde. 1 Br. 247.

Pro tenen' Cuſtumar' impedit' de via ad villam mercatoriam per ſepem & foſſat' ex tranſverſo viam in clauſo. Her. 63.

Simile. Her. 102.

Pro perſona eccleſiæ impedit' de via ad decimas carriand'. Reg. 105. 1 Br 189.

Pro vicario eccleſiæ impedit' de via ad decimas carriand' per foſſat' ex tranſverſo viam in clauſo fact'. 2 Bro. 9.

Simile de Rectore eccleſiæ decan. pro incluſo quod quer' & ſervient' ingredi ad decimas carriand' non potuer'. Br. R. 17.

Pro inhabitan' villæ de alta regia via obſtupat' ducen' per parcell' terræ vocat' M. ad R. per ſepes & januam erect'. Vid. 42.

Quer' ratione tenuræ habuit viam quam def. obſtruxit per levationem muri. Vid. 65. *Simile* Cl. Man. 173.

Quer' ſeiſit' de meſ. & terris habuit viam a meſ. ad fontem ad aquam hauriend' & ad unam acram terræ parcell' tenement' in campo pro carriagiis & fugatione averioru' trans 3 acras terræ def. in quibus def. fec' trencheas ex tranſverſo viæ. Br. R. 13.

Quer' ſeiſit' de meſ. & clauſo terræ habuit viam pro plauſtris & carectat' a meſ. trans terras def. ad præd. clauſum Et def. obſtupavit viam per erectionem domus. Br. R. 14.

Pur Leſſee pur ans ubi Leſſor habuit viam pedeſtrem a meſs' trans clauſum def. tam ad villam de W. quam ad fontem in clauſo, & def. fec' foſſat. trans maximam partem viæ, & erexit ſepem ſuperinde ac viam ill' ſubaravit. Br. R. 43. 2 Inſt. Cl. 238.

Quer poſſeſſ. & inhabitans de meſs' in villa habuit viam pedeſtrem pro ſe & ſervien' a villa de W. in per & trans clauſum voc' C. & D. ad villam B. ad eund' & redeund' & def. fec' foſſa & trencheas ex tranſverſo viæ ac viam ill' cum ſepibus & penſuris procluſit. 2 Ven. 185. *Judicium pro Quer'.*

Pro obſtupatione fontis, &c. Cl. Man. 174.

De faciendo foſſatam in via. Cl. Aſs 214.

Pro impediendo quer' in via quam habet per præſcriptionem. Id. 260.

Pur Nuſance in ewe.

De ripa foſſat' fract' & aqua diverſa a molendino. Ra. Entr 291.

Simile. Aſh. 45.

Quer' ſeiſit' de 2 antiquis & ruinoſis molendinis fullonicis ad quæ magna pars aquæ rivuli currere conſuevit, erexit 2 molendina granatica in loco eorundem. Et def. freger' ripam & diverter' aquam. 4 Co. 484.

De mult' aquæ curſu diverſo a molendino per levat' gurgitis ex tranſverſo aquæ curſus & foſſat'. Dyer 248.

Quer' ſeiſit' de molendino & 10 acris prati adjacen' rivulo, & aqua rivuli decurrebat ad molendinum Et def. obſtruxit aquam a molendino per erectionem cataract' & fecit aquam ſuperfluere pratum. 2 Bro. 62. Her. 133.

Pro

Pro Leſſee molendini de aqua diverſa per erectionem fluvial'. 3. Bro. 45.

Pro Leſſee molendini de aqua diverſa ad molendinum def. novit'. erect'. Her. 82.

De molendino erect' per def. tam prope molendin' quer' quod aqua refluxit ad rotam molendini quer' ita quod non poteſt molare. Her. 126.

Quer' poſſeſs' de clauſo prati pro termino annorum & rivulus decurrere ſolebat a quodam loco voc' W. prope clauſum præd' uſque ſtagnum & ſic ad molendinum. Et def. adeo exaltavit aquam in ſtagno quod inundavit clauſum Quer'. Co. Entr. 18. *Simile,* Aſh. 46.

Quer. ſeiſit. de 10 *acris prati adjacen' rivulo decurren' ad molendinum def. Et def. adeo exaltavit aquam in ſtagno quod inundavit pratum quer.* 1 Bro. 241. Br. 42. In. Cler. 237.

De ripa fact' ex tranſverſo aquæ curſum per quod aqua inundavit paſturam quer' adjacen'. Ub. 230.

Quer. ſeiſit. de clauſo prati ex auſtrali parte cujus rivulus decurrit & ex boreali parte alius rivulus decurrit & ambo rivuli & aquæ pluviales incidunt ad finem prati. Et def. divertit aquæ curſum & perinde inundavit pratum. Her. 203. Vid. 64.

Quer. Tenens per legem Angl' de prato juxta quod rivulus decurrit. Et def. fodit in ripa prati, per quod pars prati eſt inundata. Aſh. 56.

Quer' ſeiſit' de Manerio & terris per quas habuit profluentem aquæ curſum ſine nocumento. Et def. ad molendinum novit' erect' per fluvialia obſtruxit aquæ curſum & fecit ſuperfluere ripas & currere per fimu' & puteos cannabi, per quod aqua fuit corrupta, ſic quod

averia quer' & tenentiu' non potuer. bibere de ea. 3 Br. 71.

Pur Leſſee de exec', ubi Leſſor ſeiſit. de meſ. def. habuit profluentem aquæ curſum a poſtico def. Et def. erexit Tanpits *in Curtilagio per quod aqua & aer corrumpuntur.* Co. Entr. 29.

Quer' ratione tenuræ habuit ſeparal' piſcariam. Et def. erexit un Dyhouſe *& fec' ſordida decurrere abinde in piſcaria.* Ra. Entr. 442.

Pur Leſſee meſ. in London qui habuit pipam plumbi pro conveiancia aquæ a coquina ſua per atrium def. intratum. Et def. locavit cumulum carbon' in atrio juxta parietes meſ. & proinde obſtruxit curſum aquæ, & parietes putrid' devener'. Aſh. 43.

Pro aſſign. termini in meſ. fonte aquæ & canali plumbeo ubi def. affixit pipam plumbi ad canalem & deduxit aquam a meſ. Aſh. 44.

Quer' ſeiſit. de molendino habuit aquæ curſum decurren' in L. uſque molendinum, Et def. ripam fregit. & curſum aquæ a molendino divertit. Cl. Aſſ. 209. Han. 32. 2 Inſt. Cl. 234.

Pro diverſione aquæ extra antiquum curſum. Cl. M. 120. 2 Inſt. Cl. 234.

Pro Obſtructione ſentinæ. Cl. Aſs. 267.

Quer' ſeiſit. de 2 meſ. & gardino per murum incluſ. contigue adjacen' Regiæ viæ extra quam aquæ curſus ſolebat decurrere uſque atrium. ſpectan' pandoxatorio, Et def. cum terra & lapidibus curſum aquæ prope atrium obſtruxit ita quod parietes meſ. & gardini putrid' devener' & nec quer' neque tenen' ad al' meſs. in Regia via tranſire potuer'. Wi. Entr. 47. *Demur' inde Special'.*

Quer' poſſeſſ. de clauſo & prato pro termino annor' & aquæ pluvial' a cœlo deſcend. eum decurrere ſolebant

ſolebant a monte in viam regiam & abinde in pratum quer'. Et def. divertit aquæ curſum & perinde inundavit clauſum quer'. Tho. 39.

Quer. poſſeſs' de antiquo meſ. adjacen' aquæ curſui, & def. in projiciendo magnas quantitates feditatis aquæ curſu' obſtupavit per quod aquæ in meſ. irruit & inundavit & bona quer' ſpoliavit. 1 Bro. 57. 2 Inſt. Cl. 235.

De aqua in ſtagno adeo exaltat' per def. quod inundavit clauſum Quer' per quod proficuum amiſit & arbores fuer' ſpoliatæ. Tho. 42.

Pro tenen' Cuſtomar. verſus un' Tanner de Tanpits erect' prope rivulum decurren' ad meſs' quer' per quod aqua corrupt' devenit & omnino inſaluber. Ra. Entr. 66. Hern. 254.

Quer' ſeiſt. de clauſo paſturæ, trans quod rivulus decurrere ſolebat in quo quer' habuit piſcariam ut ad clauſum ſpectan' & def. erexit domum pro confectione aloni. Et aduſtas fodianas & rudes in rivulo dejecit, per quod aqua fuit corrupta & piſces interierunt & averia quer. non poſſunt bibere. Tho. 26.

De ripis de maritimis contra fluxum & impetum maris quas def. debuit reparare non reparat' per quod aqua inundavit terras quer'. Br. R. 67. 2 Inſt. Cl. 113.

In permittendo tegumentum nuper erect' (per virum def.) ſtare in nocumentum meſs' quer' per aquam plavial' decurreu' a tegumento & eadem ſuper meſs'. 2 Bro. 57.

Pur Erections ou non Reparac', & pur Nuſance.

Quer. ſeiſit' de meſs' & parcell' terræ adjacen'; & def. poſſeſs' de horto adjacent' in quo erexit

lignile & adificium pro porcis. Co. Entr. 19. 9 Co. 57. Ra. 18.

Pur Leſſee meſs' in Civitate de 2 fæneſtris obſcurat' per erectionem lignilis in atrio adjacent. Her. 140. Raſt. 7. Cl. Man. 57.

Quer. Leſſee meſs' in London in quo antiquæ fæneſtra, quam def. poſſeſſor. atrii adjacent. obſtruxit per aſſeres erect. Aſh. 42.

Quer. Leſſee meſs' in London habuit 3 fæneſtras. Et def. poſſeſs' de alio meſs' & pecia terra adjacent' erexit domum in præd' pec' terræ quod obſtruxit luminar' quer. Co. Entr. 200. 1 Bro. 320.

Quer' Leſſee meſs' in London quod intendebat exaltare. Et def. erexit domum adjacen' ſuperpenden' domum quer. per quod quer' eſt impedit' de ſtructura & luminaria obſcurantur. 3 Bt. 46. Her. 197. Ra. 56.

Quer' Leſſee meſs' & def. poſſeſs' de meſs' & atrio vel vacua pecia terræ adjacent. ſuper qua def. erexit domum & perinde obſcuravit 2 feneſtras quer. Her. 98.

De Domo erect' per def. tam prope ſolum quer' quod aquæ pluviales deſcend' de domo in ſolum quer'. Ra. Entr. 442.

De molendino equino erect' ad nocumentum liberi molendini Quer'. Ra. Entr. 9.

I. ſeiſit' de meſs' & terris ad quæ habuit communiam ſpectan. dimiſit quer' qui impoſuit equu' ibidem qui in defec' eſcurac' foſſat' def. inter clauſum ſuum & communiam interiit in luto. Aſh. 41.

De puteo fact' in communia in quem equus quer' cecidit & interiit. Her. 123.

Quer' ſeiſit. de meſs' & curtilagio & def. ſeiſit. de meſs' & curtilagio adjacen' & def. fodit foveam calcariam in curtilagio ſuo tamprope curtilagium

tilagium quer', quod domus & fraxinus quer' in eodem & magna pars terræ quer' ceciderunt in foveam. Aſh. 47. Vid. 2. Saund. 397.

Verſus Gardianos eccleſiæ de guttura inter eccleſiam & tenementum quer. non reparat'. Ra. Ent. 10. Vet. Intr. 195.

De Guttura inter domos non reparat'. Reg. 104. Aſh. 16.

Quer' Leſſee coquinæ in London unde pars fuit ſuper Shopam & introit' domus def. ſupportat' per murum & maeremium ſuperinde. Et def. proſtravit murum & maeremium, per quod coquina cecidit. Her. 204. Vid. 65.

De ripa juxta rivum non reparat' per quod aqua inundavit terras quer' adjacentes. 29 E. 3. 32.

Simile de foſſat' non reparat'. 46 E. 3. 8. 12 Hen. 4. 7.

Pur Leſſee meſs' & terrar' & def. ſeiſit. de meſs' adjacen' debuit fac' fenſur' inter meſs' quæ ſunt irreparat'. 1 Bro. 263.

Quer' ſeiſit' de clauſo pro vita & def. ſeiſit' de clauſo adjacen' debet fac' ſepes inter clauſa in quar' defec' averia aliena intraverunt & averia quer' exier' e clauſo ſuo. Her. 61.

Simile ubi quer' eſt ſeiſit' de 6 acris terræ & def. ſeiſit' de 2 acris terræ adjacen'. Her. 190.

Pro rectore eccleſiæ verſus exec' prioris Rectoris de reparac' domor' rectoriæ infectis. Her. 136.

Pro obſtupation' luminum in London. Wi. Entr. 46. *Simile,* Cl. Man. 118. 2 Inſt. Cl. 244. 247. *Nota inde.* Ra Entr. 8.

Simile by an Aſſignee of a Leſſee *in Civit' Weſtm'.* 2 Mod. Intr. 87.

Quer' Leſſee meſs' in London habuit antiquas feneſtr' in Culina meſs' Et def. poſſeſs' de alio meſs' adjungen' meſs' quer' quod adeo ſemper ſcituat' exiſtit' quod lumin' feneſtræ quer' non impediebat & def. novum ædificum erexit' prope culinam quer' per quod lumen culinæ in magna parte obſcuravit. Vid. 28.

Simile de meſs' qui habuit 7 feneſtr' quæ obſtupat' fuer' per erection' novi ædificii. Br. R. 34.

Pro tenen' Cuſtumar' ſeiſit meſs' in Stepney in quo habuit 4 feneſtras & pred' poſſeſs' de alio meſs' & atriæ ſuper quo def. 2 Caminas tam prope meſs' quer' de novo ædificavit quod non ſolum luminar' obſtruxit ſed aquæ pluviales deſcend' in ſolum quer'. Tho. 26.

Quer' Leſſee meſs' in Civitat' B. habuit 4 feneſt', & def. poſſeſs' de alio meſs' & pecia terræ adjacen. erexit domum in pecia terræ per quod obſtruxit luminar' quer'. Vid. 6.

Quer' poſſeſs' de ſhopa in qua habuit feneſtr' & def. poſſeſs' de domo voc' a Shed *quod de novo erexit ſuperpenden' Shopam quer' per quod lumen ſhopæ & feneſtræ obſtruxit.* Wi. Entr. 46.

Quer' ſeiſit. de meſs' ante conflagration' London quod combuſt' fuit & def. poſſeſs' de alio meſs' adjacen' quod erection' pecias maheremii tranſverſar' poſuit, per quod Quer' reædificare meſs' ſuum impedit' fuit. Vid. 11.

Quer' poſſeſs' de meſs' & def. poſſeſs' de al' meſs' ruinoſo adjungen' def. poſtravit domum ruinoſam per quod pars meſs' quer' cecidit' & reſid. diſjunct' deven'. Tho. 38.

Pur Leſſee meſs' & terrar. & def. ſeiſit. de meſs' & terris adjacen' debuit facere fenſur' inter meſs' quæ fuer' irreparat. 1 Bro. 28. *Simile* Cl. Man. 185.

De

Per Fedities.

De un' Sinck prope domum quer' Barber *per def.* Shoemaker, *qui injecit fætida decurren' in atrium quer'.* Her. 180, 208. Raſt. 42:

Pur Leſſee meſ' atrii & Gardini verſus unum Butcher *occupatorem lanificii & atrii qui exaltavit atrium ſuum & fecit Gutturam in quam injecit ſanguinem & ſordida beſtiar' interfect', & fecit eadem decurrere in atrium & gardinum Quer'.* Her 236.

Pro piſtore Leſſee de inferiori meſ' verſus inhabitan' in camera ſuperiori, qui projecit urinam & al' ſordida quæ deſcender' in farinam & panem quer'. Aſh. 47.

Pur un' Butcher *haben' Shopam prope quam def. locavit lutum, &c. per quod carnes quer' fuer. pejorat. pulvere.* Aſh. 49.

Quer' ſeiſit. de gardino incluſ. cum muro lateritio. Et def. erexit latrinam adjacen. muro & poſuit terram ad murum per quod cecidit, & fœditates intraverunt gardinum. Aſh. 43.

Verſus tenen' meſſuag. qui permiſit aquam fœtidam exeun' a coquina decurrere in clauſum quer' per quod ipſe ſervien' & averia in corporibus ſuis multiplicit. infect. & corrupt. devener' 1 Bro. 44.

Quer. ſeiſit. de meſ' & gardino & def. poſſeſſ' de domo braſiar. adjacen. def. convertit domum braſiar' in pandoxatorium per quod quer. amœnitatem meſ' & gardini amiſit. Vid. 13.

Def. erexit unum Shed *pro liquefactione* Tallow *tam prope meſ' quer. quod quer. in meſ' habitare non potuit.* Vid. 11.

Def tenuit fornacem calcariam per quam herbæ & fructus Gardini quer' ſpoliat' & ſuffocat. fuer'. Cl. Man. 150.

Pro impoſitione calcis in aquam ad deſtruend' piſces. Aſh. 267, 274.

CHAP-

CHAPTER.

Of Actions on the Case for Diſceits and on Warranties.

Of Bail in Action on the Caſe for Diſceit.

IN an Action on the Caſe for affirming himſelf to be of full Age; *ubi revera* he was under Age, *per quod* he got great Sums of Money on Mortgages; the Court was moved) That the Defendant ſhould put in ſpecial Bail; but the Motion was not granted. 2 *Sid. Chetwin v. Vennor.*

That no ſuch Action lies.

After Verdict for the Plaintiff in an Action on the Caſe for affirming himſelf to be of full Age, *per quod* the Plaintiff lent him great Sums of Money; *ubi revera* he was under Age, and thereby had avoided his Security; after Verdict for the Plaintiff, 'twas moved in Arreſt of Judgment, That no Action lay againſt the Defendant for this; and for this Cauſe Judgment was ſtaid. See 2 *Sid.* 253. *Johnſon v. Pye. S. C.* 1 *Lev.* 169.

No againſt a married Woman for affirming herſelf ſole.

No Action lies againſt a married Woman for affirming her ſelf to be Sole, *per quod* the Plaintiff married, becauſe all Contracts of a Feme Covert are void. 1 *Lev.* 247. *Cooper v. Whetham & ux'.*

Or for one Tenant in Common v. the other.

No Action lies for one Tenant in Common againſt the other for a Diſceit concerning the Thing they are Tenants in Common of. 1 *Lev.* 29. *Graves v. Sawcer. S. C. Raym.* 15.

If

If any Perſon ſell corrupted Meat, tho' he don't warrant it, yet an Action on the Caſe will lie againſt him; ſo if one ſell bad Cloth, knowing it to be ſo, tho' he don't warrant it, an Action on the Caſe lies; but if the Seller of the Cloth did not know it to be bad, and did not warrant it, then no Action will lie. See *Keilw.* 91.

When Caſe lies without Warranty v. Seller of a bad Commodity, tho' he did not know it to be bad. Where not unleſs he knew the Thing faulty.

If *A.* has Money delivered to him to be paid to *B.* and *C.* knowing of this, comes to *A.* and affirms himſelf to be *B.* and *A.* pays *C.* the Money, *A.* may have an Action on the Caſe againſt *C.* for this Diſceit. *Moore* 583. *Thomſon v. Gardner.*

Caſe lies for affirming himſelf to be a different Perſon from what he is, *per quod* he got another's Money.

An Action on the Caſe in the Nature of Diſceit lies againſt one who cheats another at Cards. *Moore* 776. *Baxter v. Woodyear* and *Orbet.* And ſo it does for playing with falſe Dice. 1 *Cro* 90. *Harris v. Bowden.*

Caſe lies for cheating at Cards or Dice.

The Plaintiff declared, That her Servant bought 12 Oxen of the Defendant for 80 *l.* for the Plaintiff, and paid the 80 *l.* afterwards died; that then the Defendant fraudulently and falſly affirmed to the Plaintiff, that the 80 *l.* was not paid, with an Intent to prevail on the Plaintiff to pay the Money over again, who *fidem adhibens* to the Defendant's Allegations did pay the 80 *l.* to the Defendant. After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That no Action on the Caſe lay, but an Action of Account; *per Cur'*, the Plaintiff may have either. *W. Jones*, 196. Lady *Cavendiſh verſus Middleton. S. C.* 3 *Cro.* 141.

Caſe in the Nature of Diſceit lies for affirming a Debt was not paid, *per quod* he paid it over again.

Action

Case lies for forging a Letter *per quod* the Plaintiff's Servant paid a Sum of Money.

Action upon the Case for Deceit; whereas *Bernard Welles* was the Plaintiff's Servant in *Com' Derby*, and had 65 *l.* of the Plaintiff's in his Custody, That the Defendant to deceive the Plaintiff of the said 65 *l. quandam literam* in the Name of the Plaintiff procured to be written, and directed it to the Plaintiff's said Servant, and counterfeited the Name of the Plaintiff thereto, and sealed it *quasi* with the said Plaintiff's Seal, and caused it to be delivered to the said *Bernard Welles*, affirming it to be the Plaintiff's Letter, and that he was sent therewith unto him by the Plaintiff; whereupon he caused the same to be read, and upon reading thereof, undestanding *quod in eadem litera continebatur*, that the Plaintiff had appointed the said *Bernard* to pay and deliver to the Defendant the said 65 *l.* to the Use of *Thomas Bartlet*, to whom it was supposed by the said Letter that he was indebted; and affirmed that he was a Servant unto the said *Thomas Bartlet*, and that he was to receive the said 95 *l.* for his Master.

By Reason whereof the said *Bernard* giving Credit unto him, paid and delivered unto him the Money; *ubi revera* the Letter was counterfeited, and he never sent the Defendant, nor was indebted in any such Sum, *&c.* The Defendant pleads Not guilty, and found against him to his Damage of 105 *l.* and it was thereupon moved in Arrest of Judgment, First, That this Supposition *quandam literam scribi fecit*, where it ought to be *literas*; for it is not possible that one Letter might comprehend it, was not. Secondly, That this Action lies for the Servant, and not for the Master. Thirdly, That it was not shewn what was

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contained in the Letter; for it is only, that the ſaid Servant *intelligebat* what was therein written, and that might be his Miſconſtruction. But all the Court, after ſeveral Motions, held it to be well enough; for the Deceit and Abuſe is to the Maſter, and the Loſs only to him, wherefore the Action well lies for him, altho' it is not ſet down preciſely what was in the Letter; but that *intelligebat* ſuch Matter was contained therein, which is uncertain; yet becauſe the Deceit is alledged to be in the Delivery of the counterfeit Letter, and affirming, that he was Servant of *Thomas Bartlet*, and ſent by the Plaintiff to receive ſuch a Sum as due by him to the ſaid *Thomas Bartlet*, (all which was falſe) all which being Deceit upon the whole Matter the Action well lies, and was adjudged for the Plaintiff; and afterward a Writ of Error being thereof brought, and all theſe Matters aſſigned for Error, the Judgment notwithanding was affirmed. 2 *Cro.* 223. *Tracy v. Veal.*

In Caſe for aſſigning forged Bills need not ſhew how they were aſſigned.

An Action on the Caſe was brought for ſelling Bills of publick Faith, that were falſe, knowing them to be falſe, with an Intent to deceive the Plaintiff; on Demurrer to the Declaration, ſeveral Exceptions were taken, but the only one that did not particularly concern thoſe Bills, which were Bills of the Rump-Parliament, was, that the Plaintiff ſaid they were aſſigned to him in due Form of Law, but did not expreſly ſhew what that due Form was; but 'twas reſolved by *Rolle*, Chief Juſtice, That the Ground of the Action was the Deceit, which was confeſſed by the Demurrer; and that all the other Things were meerly Matter of Circumſtance; and

Judg-

Judgment was given for the Plaintiff. *Style* 343, 398. *Fowke v. Boyle.*

How to declare in Caſe for giving a falſe Note of Goods that were exciſable *per quod* the Plaintiff was damnified.

In an Action on the Caſe for delivering of a falſe Note of Goods that were exciſable, *per quod* he was forced to pay 50 *l.* After Verdict for the Plaintiff, on Not guilty pleaded, it was moved in Arreſt of Judgment, 1ſt, That the Act of Parliament that erected the Exciſe was not ſet forth. 2dly, That the Damage was not coupled with the Fraud. 3dly That it was not ſhewn how he was obliged to pay the 50 *l.* But *per Rolle*, Chief Juſtice, The Fraud is the Ground of the Action, and all theſe Things are but Matter of Circumſtance; in an Action brought for the Recovery of Damages for a Fraud, 'tis no more neceſſary to ſet forth all the Circumſtances, than in an Action grounded on a fraudulent Judgment, it is neceſſary to ſet forth all the Proceſſes therein; ſo the Plaintiff had Judgment. *Style* 368. *Brigbwell v. Robſon.*

When no Action lies on a bare Affirmance concerning the worth of a Thing, unleſs there is a Warranty.

An Action on the Caſe was brought for affirming a Term of Years to be worth 250 *l.* *ubi revera* it was worth but 100 *l.* After Verdict for the Plaintiff it was moved in Arreſt of Judgment, That no Action lay on the bare Affirmance of its Value, there being no Warranty; and of that Opinion was the Court. *Yelv.* 20. *Harvey v. Young.* But this is to be underſtood of Things of uncertain Value, becauſe ſuch Things may be worth more to one than to another; but if the falſe Affirmation had concerned a Thing of a determined Worth; as if the Defendant had affirmed a Houſe to be let for 50 *l. per Ann* whereas 'twas let for 20. the Action would well lie. See 2 *Sid.* 146. *Leakins v. Cliſſet.* S. C. 1 *Lev.* 102.

Action upon the Caſe, for that the Defendant *falſo & deceptive* ſold unto him, ſuch a Day 220 Sheep, affirming that they were his own Sheep; *ubi revera* they were the Sheep of *J. S.* The Defendant pleaded Not guilty, and found againſt him, and it was moved in Arreſt of Judgment, That the Action lay not, becauſe he doth not ſhew that the Defendant had committed any Offence in affirming them to be his; and he doth not ſhew that he had any Damage, or that *J. S.* had retaken them, or ſued him for them; as 24 *Aſh.* 8. *Sed non allocatur*; for the Sale of Goods which were not his own, but affirming them to be his Goods, knowing them to be a Stranger's, is an Offence, and Cauſe of the Action; and if he ſhould tarry until the Goods were taken from him again, it might peradventure be miſchievous unto him, and he ſhould be without Remedy: Wherefore, *abſente Montague*, it was adjudged for the Plaintiff. 2 *Cro* 474. *Furnis verſus Leiceſter.* See *Show.* 63. *Croſs v. Gardiner.* *S. C.* 4 *Mod.* 261.

Caſe lies on the bare affirming Goods to be his own, *ubi revera* they were not; tho' the Plaintiff had no particular Damage.

In an Action on the Caſe, the Plaintiff declared the Defendant ſold him a Gelding, and on the Sale did falſly affirm unto him that the Gelding was his own, and that he bred him of a Colt, whereas he did not breed him, and that he was not the Defendant's, but *J. S.*'s. After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, Firſt, That this Action did not lie, becauſe the Defendant did not warrant the Gelding. Secondly, It was not expreſly charged in the Declaration, that the Defendant knew the Gelding to be another's; but notwithſtaning thoſe Exceptions the Court gave Judgment for the Plaintiff. *Style* 310. *Harding v. Freeman.*

Caſe for Deceit lies for ſelling a Horſe, and affirming it to be his own, *ubi revera* 'tis another's, tho' there was no Warranty.

Tho' the Declaration don't ſay 'twas done *ſcienter*, yet 'tis good after Verdict.

An

No Action on the Case lies on a bare Affirmance that he had a Property in a perſonal Thing that was not in the Party's Poſſeſſion at the Time of the Sale.

An Action upon the Caſe in Nature of a Deceit, was brought, and the Plaintiff declared, Whereas upon the ninth of *June*, 25 *El.* Queen *Elizabeth* was ſeiſed in Fee of the Advowſon of the Vicarage of *South-Stoke*, whereunto the Tithes in *S.* appertained; to which Vicarage the Defendant on the 9th of *June*, 35 *Eliz.* affirmed that he was lawful Incumbent, and had Right to the Tithes, from the Death of *Thomas Vaughan* the Incumbent; whereupon the Plaintiff, 16 *June* 35 *Eliz.* having Communication with the Defendant about his buying of the Defendant the Tithes appertaining to the ſaid Vicarage, after the Death of *Thomas Vaughan* (who died 16 *April* 35 *Eliz.*) until *Mich.* following; that the Defendant, *adtunc ſciens* that he had not any Right or Intereſt to the Tithes (whereas he was never inſtituted and inducted) but that they appertained to *Evan Thomas*, ſold them to the Plaintiff for 30 *l. falſo & deceptive*; and alledgeth *in facto*, That *Evan Thomas* was preſented, admitted, inſtituted and inducted to that Vicarage, *ult Aug.* 35 *Eliz.* and took the Tithes, and ſo the Plaintiff loſt them. The Defendant pleads Not guilty, and found againſt him; and it was moved in Arreſt of Judgment, That the Action lieth not; for an Action in Nature of Deceit lieth not, where one ſells a Thing which he has not any Property in; and altho' he took upon him in Diſcourſe, that he was Owner, and had Right to ſell, unleſs he warrants that the other ſhould enjoy it accordingly (which Warranty ought to be at the Time of the Sale) it is not good; but there is not any Warranty nor Affirmance at the Time of the Sale, that he had any Right or Title to ſell; for his

Affirmance that he was Vicar, and had a Right to ſell, was upon the ninth of *June*, and the Sale was the 16th of *June* after; and in Proof hereof, relied upon 5 *H.* 7. 41. 9 *H.* 7. 21. and *Chandelor* and *Lopus*'s Caſe, *Paſc.* 1 *Jac.* And of that Opinion were *Tanfield*, Chief Baron, and *Altham*. But if a Man ſells Victuals which is corrupt, without Warranty, an Action lieth, becauſe it is againſt the Commonwealth; as 9 *H.* 6. 53. 7 *H.* 4. 15. and 11 *Ed.* 4. 6. and altho' the Book of 42 *Aſſ. pl.* 8. was objected, where one took Goods from another and ſold them, and the Owner retook them, that an Action upon the Caſe was brought in Nature of Deceit, for this Falſity in Sale, without any Warranty. *Tanfield* thereunto anſwered, That the ſaid Fact is not adjudged, but the Party admits it and takes Iſſue; yet if it were allowed to be Law, it is, becauſe he there had Poſſeſſion by Tort, and ſo had Colour in Shew to be Owner; and he was deceived by buying of them, who had only gained a tortious Poſſeſſion: And altho' he had not any Right, yet every one took Conuſance of him as Owner, and he himſelf knew that he was not the right Owner; which is the Reaſon that the Action was maintainable: But here he had not any Poſſeſſion; and it is no more than if one ſhould ſell Lands wherein another is in Poſſeſſion, or a Horſe, whereof another is poſſeſſed, without Covenant or Warranty of Enjoyment, it is at the Peril of him who buys; and not Reaſon he ſhould have an Action by the Law, where he did not provide for himſelf; wherefore it was adjudged for the Defendant. 2 *Cro.* 196. *Roſwell* ver. *Vaughan*.

Where no Action lies for a falſe Affirmation, tho' the Plaintiff had a particular Loſs.

Action upon the Caſe; Whereas 10 *Decemb.* 11 *Jac.* there was Communication betwixt the Plaintiff and Defendant, concerning the hiring of the Plaintiff to carry for the Defendant, with Horſes and Wain, a Load of Madder, from *Exhall* in the County of *Eſſex*, unto *Uppingham* in the County of *Rutland*; and that then and there, to deceive him in the Carriage thereof, he affirmed fraudulently that the ſaid Load of Madder was but of 800 Pound weight; and that he giving Credit to this Affirmation, undertook the Carriage of the ſaid Madder, and that the Defendant promiſed to pay him for every hundred Weight 2 *s.* 8 *d.* and that he giving Credit that the ſaid Madder was 800 Weight, carried it according to the ſaid Agreement, and alledges *in facto* that the ſaid Load of Madder weigh'd much more than 800 Weight, *viz.* 2200 Weight, by Reaſon whereof his Horſes drawing the ſaid Wain, with the Load of Madder, being laden with ſo great Weight, were compelled *ita vehementer laborare & trahere*, that ſeven of his Horſes which drew the ſaid Wain, *ratione inde periebant per quod, &c.* The Defendant pleaded Not guilty, and found againſt him; and it was now moved in Arreſt of Judgment, That this Action lieth not; for he being hired to carry by the Hundred, it was his own Folly to over-load his Horſes, and it was a Matter which lay in his own View and Conuſance; and if he doubted of the Weight thereof, he might have weighed it, and was not bound to give Credence to another's Speech; and being his own Negligence he is without Remedy; as where one buys an Horſe, upon warranting him to have both his Eyes, and he had

had but one, he is remediless; for it is a thing which lies in his own Conusance, and such Warranty or Affirmation is not material, or to be regarded. But otherwise it is in Case where the Matter is Secret, and lies properly in the Conusance of him who warranted it, and cannot be known to him who buys or makes the Contract; for the Law gives no Remedy for voluntary Negligence; and of that Opinion was the whole Court, altho' it was said, That there was apparent Fraud here in him who affirm'd, *&c.* and peradventure the Plaintiff was a Stranger there where he undertook the Carriage, and had no Weights to weigh it; but it was answered it was his Negligence, that he would take a Weight so far exceeding the Affirmation, without causing it to be weighed; wherefore Judgment was staid. 2 *Cro.* 386. *Baily* v. *Merrell. S. C.* 3 *Bulst.* 94. 1 *Cro.* 793.

Action upon the Case; whereas *Bud* had brought Debt in the Common Bench, upon a Bill of 40 *l.* against the Plaintiff, and upon Examination, it appeared to the Court, That all besides 28 *s.* was paid; whereupon they in *Trinity*-Term, ordered, That if the Plaintiff would accept of the 28 *s.* with such Damage as the Court should assess, then the now Plaintiff should imparl until *Octabis Mich.* That the Defendant knowing of this Order, had procured a *Nihil dicit* to be entred, and upon this Deceit he brought this Action. And it was thereupon demurred, First, In Regard of the Manner of the Pleading, because he doth not averr, That he tendred the 28 *s.* for otherwise the Plaintiff (then Defendant) was not to have the Benefit of the

Order. Secondly, This Action lies not in Respect of the Matter; for this entring of the *Nihil dicit* is the Fact of the Court, whereupon none can reap Advantage, nor any Action lies for it; and in Proof thereof was cited 26 *Ass.* Pl. 46. and 21 *Ed* 4. 22. where a Writ of Privilege was granted without Cause, no Action lies. But all the Court held, That the Action for the Matter would well lie, for procuring a *Nihil dicit* to be entred in Abuse of the Court, whereby the Party, Defendant in the Action, suffered Prejudice. And therefore if one procures another to sue me without Cause, an Action lies not against him who sued without Cause; but for this Falsity in procuring my Vexation, an Action well lies. So where one casts a Protection in delay of my Action; and likewise for every Falsity an Action on the Case is maintainable; but here this is not good for the Matter, because there is not any Tender, or Refusal in the other to accept of the 28 Shillings alledged; for without that there is not any Breach of the Order in the now Defendant; and his then procuring of the *Nihil dicit* was lawful; wherefore, *&c.* 1 *Cro.* 793. *Berren v. Bud.*

Case don't lie on an affirming a Thing to be what it is not, unless the Party warrant it.

In an Action upon the Case, whereas the Defendant being a Goldsmith, and having Skill in Jewels and precious Stones, had a Stone which he affirmed to *Lopus* to be a Bezoar-stone, and sold it unto him for 100 *l. ubi revera* it was not a Bezoar-Stone. The Defendant pleaded Not guilty. After Verdict, and Judgment for the Plaintiff in the King's Bench, Error was thereof brought in the Exchequer-Chamber; because the Declaration contains not Mat-

Matter ſufficient to charge the Defendant, (*viz.*) That he warranted it to be a Bezoar-ſtone, or that he knew that it was not a Bezoar-ſtone; for it may be, he himſelf was ignorant, whether it was a Bezoar-ſtone or not. And all the Juſtices and Barons (beſides *Anderſon*) held, That for this Cauſe it was Error; for the bare Affirmation, that it was a Bezoar-ſtone, without warranting it to be ſo, is no Cauſe of Action; and altho' he knew it not to be a Bezoar-ſtone, it is not material; for every one, in ſelling of his Wares, will affirm that his Wares are good, or the Horſe that he ſells is ſound; yet if he warrants them not to be ſo, it is no Cauſe of Action; and the Warranty ought to be made at the ſame Time of the Sale; as *Fitz. N. B.* 94. *c.* and 98. *b.* 5 *H.* 7. 41. 9 *H.* 6. 53. 12 *H.* 4. 1. 42 *Aſs.* 8. 7 *H.* 4. 15. Wherefore, foraſmuch as no Warranty is alledged, they held the Declaration to be ill. But *Anderſon*, to the contrary; for the ſelling it for a Bezoar, whereas it was not ſo, is Cauſe of Action; but notwithſtanding it was adjudged to be no Cauſe, and the Judgment was reverſed. 2 *Cro.* 4. *Chandlor verſus Lopus.*

In an Action on the Caſe; the Plaintiff declared, That the Defendant being poſſeſſed of divers Goods (*viz.*) of three counterfeit Jewels, and having Factors in *Barbary*, and knowing that the Plaintiff was beyond the Seas, he acquainted his Factor therewith, and commanded him to conceal the counterfeiting thereof, and directed him to the Plaintiff, being there; and the Factor came unto the Plaintiff, and intreated him to ſell thoſe Jewels for him, telling him they were good

No Action of the Caſe lies v. Maſter for his Factors affirming counterfeit Jewels to be true ones, tho' the Maſter ordered him to do ſo, tho' the Plaintiff received a particular Damage thereby.

Jewels; whereupon the Plantiff not knowing that they were counterfeit, ſold the Jewels, being of the Value of 100 *l.* to the King of *Barbary* for 800 *l.* and delivered the Money to the Factor, who delivered it over to his Maſter; that the King of *Barbary* afterwards finding they were counterfeit, committed the Plaintiff to Priſon until he repaid the ſaid King 800 *l.* and that afterwards the Plaintiff requeſted the Defendant to pay back unto him the ſaid 800 *l.* and he refuſed. The Defendant pleaded the General Iſſue; and the Jury upon a ſpecial Verdict, found all this Matter, excepting, that the Defendant had directed his Factor to the Plaintiff, and that the Defendant had commanded his Factor not to diſcover that the Jewels were counterfeit. And it was argued for the Plaintiff, Firſt, That where one is Party to a Fraud, all which followed by Reaſon of that Fraud, ſhall be as done by him; and here the Defendant is the firſt Actor in this Fraud; Firſt, By his knowing they were counterfeit. Secondly, By ſending his Factor and ſelling them in *Barbary*. And to that Purpoſe were cited *Plowd. Comment.* 473. *Sanders's* Caſe of the poiſoned Apple; and *Co.* 9. 81. *Gory's* Caſe; and in this Caſe it is a Deceit, altho' there be not any Warranty; as 9 *H.* 6. 53. and 21 *Aſs. pl.* 41. and 42 *Aſs. pl.* 8. 7 *H.* 4. 15. 11 *E.* 4. 6. 5 *E.* 4. 126. and *Co.* 4. 18. 20 *H.* 6. 35. and *Chandler* and *Lopus's* Caſe adjudged in this Court 1 *Jac.* where one ſells a Bezoar-ſtone, *ſciens* that it was counterfeit, and he did not warrant it; yet for that it was *ſciens*, the Plaintiff had Judgment. Secondly, he held, That altho' the Jury had not found all the Matter con-

contained in the Declaration; yet becauſe they have found Matter ſufficient, that the Plaintiff ſhall recover: And to that Purpoſe were cited *Bridge*'s Caſe, in *Dyer* 75. and Sir *John Sydenham*'s Caſe *verſus Man* in this Court, where the Words were, *If Sir* John Sydenham *could have his Will, he would kill*, &c and the Jury found that he ſpake theſe Words, *I think in my Conſcience if Sir* John, *&c.* And it was adjudged, That altho' the Verdict be different, the Plaintiff could recover, *&c.* So here, *&c.* And it was argued to the contrary for the Defendant, That the Finding in the Verdict is ſo material in the Variance, that there remains not Matter ſufficient in the Declaration to maintain the Action. Firſt, They cannot be ſaid to be counterfeit Jewels, becauſe it is confeſſed by the Plaintiff, and ſo found by the Jury, that they were of the Value of a 100 *l.* which is a competent Value for good Jewels, and the Value of the Jewel conſiſts in the Eſtimation of him who will buy it; and to that purpoſe was cited 38 *&* 39 *Eliz.* in the Common Bench, *Dampat ver. Symſon.* Secondly, Becauſe there was not in this Caſe any Warranty made to the Plaintiff, that it was a good Jewel; as 11 *E.* 4. 6. 7 *H.* 4. and 13 *H.* 4. 1. Thirdly, That the Deceit done unto the Plaintiff is found to be done by his Servant; and the Jury find that the Maſter did not command the Servant to conceal them to be counterfeit; and then by his general Power to ſell the Maſter ſhall not be charged, if the Servant exceed his Power. *Vid.* 9 *H.* 6. 33. and *Doctor* and *Student*, 137. Fourthly, For that the Servant had but a Power given him from his Maſter to ſell, which Power he

cannot assign over to another. Therefore for these material Variances an Action upon the Case, being an Action founded upon the Truth of his Case, which if it fail, the Action also perisheth, he conceived the Action was not maintainable; and to that Opinion the Justices inclined, and principally for the third Reason. And in *Trin.* 16 *Jac.* it was argued again by *Davenport*, for the Plaintiff, who answered to that Objection, That for the Sale by the Servant, the Master ought not to be responsible; and he said, That as the Fraud in the Master was general, and his Direction for the Sale thereof, and so he shall be answerable for the Damages that any particular Person hath thereby; and compared it to the Case of 27 *H.* 8. 22. of a Nusance in the Highway; and what is done by the Servant, the Master shall not avoid, appears 9 *H.* 6. 53. and 11 *Ed.* 4. 6. *Long* 5° *Ed.* 4. 17. *Dyer* 238. In this Case also the Master's Receit of the Money for the Jewels, joined with his precedent Command, shall charge himself; for an Assent subsequent without any precedent Commands, shall charge him as his own Act. 2 *H.* 7. 17. 2 *H.* 4. 18. And as to that Objection, That there is such material Variance betwixt the Verdict and the Declaration, that it destroys the Action. He said, That where many Circumstances are alledged to induce an Action, and some Part of them material, and some not, if so much be found by the Verdict to maintain the Action, it is good enough; otherwise it is in an *Assumpsit* upon two Considerations; if the Jury find the one, and not the other, there the Action falls, because the *Assumpsit* is found upon the Total

Total Conſideration; as 27 *H.* 8. 24. Sir *Thomas Coventry*, Solicitor General, for the Defendant, and he vouched ſeveral Caſes wherein the Maſter is not charged for the Act of his Servant; as to the Book of 9 *H.* 6. 53. urged againſt him, he ſaid, That *Fitz. N. B. f.* 94. is otherwiſe; which is, That if one ſell certain Pipes of Wine, with Warranty, and they are corrupt, Action upon the Caſe lies; which implies, that it lies not without Warranty, that may be reconciled; for as 11 *E.* 4. 6. is, If a Man ſell corrupt Victuals, an Action upon the Caſe lies without Warranty, becauſe it is prohibited by the Law to ſell corrupt Victuals; but in the ſame caſe of Wine, if it be ſmall Wine, and the Party buys it for ſtrong Wine, no ſuch Action lies. And in this Caſe, altho' the Defendant commanded his Servant to ſell, *&c.* it is to be taken a Sale in lawful Manner; as 11 *Ed.* 4. and 9 *H.* 6. 51. 13 *H.* 7. 15. The Plaintiff alſo in this Caſe, hath not alledged any legal Damage; for he ought to have alledged, That he was arreſted and impriſoned after the Law of *Barbary*; but if the Impriſonment were tortious, then he hath not any legal Damage; as 38 *H.* 6. is. But here be three material Variances betwixt the Declaration and the Verdict, ſo as there cannot be any Cauſe to maintain this Action, *&c.* *Dodridge*, Juſtice, If a Goldſmith makes Plate, wherein he mingles Droſs, ſo as it is not according to the Standard, and ſends his Servant to a Fair to ſell it, who ſells it for good Plate, according to the Standard, that an Action upon the Caſe lies againſt the Maſter. *Ad quod Montague* aſſented, becauſe it fails in the Price in Silver. But here

here it fails but in the Value; for Jewels are ſold for their Valuation. *Note*, This Diverſity *Pretii & valoris*. *Houghton*, Juſtice, If one command his Servant to ſell an ill Horſe, and the Servant ſells him for a good one, whereby the Servant is arreſted and indamaged, yet the Servant ſhall not have his Remedy againſt his Maſter. And *Doderidge* cited a Caſe to be adjudged 33 *Eliz.* in the Common Bench; a Clothier of *Glouceſterſhire* ſold very good Cloth; ſo that in *London*, if they ſaw any Cloth of his Mark, they would buy it without Searching thereof; and another, who made ill Cloth, put his Mark upon it without his Privity, and an Action upon the Caſe was brought by him who bought the Cloth, for his Deceit, and adjudged maintainable. And the Court in the principal Caſe inclined in their Opinions againſt the Plaintiff. 2 *Cro.* 468. *Southern ver. How.* *S. C.* 2 *Roll.* 5. *S. C. Popham* 26. *S. C. Bridgman* 125. *Note*, By the other Books it don't appear that there was any Judgment given in this Caſe; but *Bridgman* ſays, Judgment was given for the Defendant.

How to declare on a Warranty.

Action upon the Caſe, for that the Defendant, 31 *Maii* 19 *Jac.* had bargained with the Plaintiff to ſell him a Mare; the Defendant *Adtunc & ibidem ſciens* the ſaid Mare to be lame *& variis infirmitatibus deficere* (viz.) with Spavins, Splints, *& ad laborandum impotentem, Equam præd' ſanam & abſque ulla infirmitate warrantizavit, & eandem Equam præd'* 31 *Maii* 19 *Jac. pro* 20*l. apud London, &c. eidem* Willielmo *falſo & fraudulenter adtunc & ibidem vendidit & ſic dictus def. fallaciter decepit* the Plaintiff of the ſaid Mare, to his Damage, *&c.*

The Defendant pleaded Not guilty, and found againſt him; and it was moved in Arreſt of Judgment, That the Declaration was not good; Firſt, Becauſe he doth not ſay, *Warrantizando vendidit*; for otherwiſe it may be, that the Warranty was at one Time, and the Sale at another Time, altho' they were both in one Day, and then the Action is not maintainable. And altho' the Precedents in the Book of Entries, be in this Manner, it was anſwered, That it is *Warrant. vendidit*, which being ſhortly Writ, may be expounded *Warrantizando*, which conjoins it to the Sale; but as it is, it may be otherwiſe intended, and then the Declaration is naught. Secondly, This Declaration is uncertain for want of the Word (*Et*) after the *Warrantizavit*; for as it is, it is inſenſible. And of that Opinion were *Doderidge* and *Chamberlain*. But *Lea*, Chief Juſtice, did not deliver any Opinion; wherefore the Defendant appearing, the Plaintiff declared *de novo*. 2 *Cro.* 630. Sir *William Pope v. Lewyns*

How to plead Specially in Caſe for a Deceit.

In an Action upon the Caſe was brought in Nature of a Deceit, that the Defendant had ſold to the Plaintiff certain Sheep, and had warranted them to be ſound, when in Truth they were rotten. The Defendant pleads, That they were ſound at the Time of the Sale, *Et de hoc ponit ſe ſuper patriam*. The Plaintiff demurs, and it was adjudged for him, becauſe the Defendant had taken Traverſe to the Cauſe of Action, (*viz.*) *abſque hoc* that they were rotten; and Iſſue ſhall not be taken upon two Affirmatives. 4 *H.* 7. 13. *a.* 1 *H.* 7. 9. *b. c. Noy.* 124. *Reedhead* againſt *Harper*. *S. C. Yelv.* 124.

In

Sciens he had no Title, good Averment in a Declaration that he had none.

In an Action on the Case the Plaintiff declared, That the Defendant sold him Tithes for so much Money, *sciens* that he had no lawful Title to them. After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Declaration did not expresly charge that the Defendant had no Title; yet the Plaintiff had Judgment. *Moore* 467.

Evidence of a Sale and Warranty of one, good to maintain a Declaration for the Sale and Warranty of two Oxen.

In an Action on the Case, the Plaintiff declared, That the Defendant sold him two Oxen, and warranted them, *&c.* The Jury on *Non culp'* pleaded, found that the Defendant sold one Ox; and 'twas alledged that this did not maintain the Declaration, because the Contract to which, by it the Warranty is supposed to knit, is variant from what the Jury found; but the Court gave Judgment for the Plaintiff, because the Action is grounded on the Deceit, not on the Warranty. 1 *Cro.* 884. *Gravenor v. Meere.*

Evidence of a Deceit in the Factor good, to maintain an Action against the Merchant.

In an Action on the Case for a Deceit, the Plaintiff set forth, That he bought several Parcels of Silk for ——— Silk, whereas it was another kind of Silk; and that the Defendant knowing this Deceit, sold it him for ——— Silk. On Trial, upon Not guilty, it appeared that there was no actual Deceit in the Defendant, who was the Merchant, but that it was his Factor beyond Sea; and the Doubt was, If this Deceit could charge the Merchant? And *Holt*, Chief Justice, was of Opinion, that the Merchant was answerable for the Deceit of his Factor, tho' not *criminaliter* yet *civiliter*; for seeing some Body must be a Loser by this Deceit, it is more Reason that he that imploys and puts a Trust and Confidence in the Deceiver, should be a Loser

Loſer, than a Stranger: And upon this Opinion the Plaintiff had a Verdict. 1 *Salk* 289. *Herin verſ. Nicholas.*

A Precedent of a Declaration for a Deceit, on a Warranty.

London' ſſ. Willielmus Venables Armig' queritur de Edwardo Wright in Cuſtodia Mar' Mareſc' Dom' Regis coram ipſo Rege exiſtend' p eo videlt quod cum p̄imo die Julii anno Reg' Caroli Secundi nunc Regis Angl', &c. tricesſimo tertio apud London in paroch' Beate Marie de Arcubus in Warda de Cheap quoddam colloquiū habit' & mot' fuiſſet inter p̄fat' Williel' & Edward' de quodam equo ipſius Edwardi deque firmitate (Anglice Soundneſs) equi illius in pedibus ſuis ac de venditione eiſdem equi p̄fat' Will' p̄dict' Edwardus ea intentione ad defraudand' & decipiend' p̄fat' Willielmum ſciens equū illum ſore equū pedibus claudū (Anglice Foundred) falſo & deceptive adtunc & ibidem affirmavit & aſſeruit eidem Willielmo quod equus p̄dict' fuit firmus (Anglice Sound) & abſque aliqua claudicatione in pedibus ſuis quibus quidem affirmation' & aſſertion' ipſius Edwardi idem Willielmus fidem adhibens adtunc & ibidem cum p̄fat' Edwardo ad equum p̄dict' de eod' Edwardo emend' bargan̄izavit p̄dict' Edwardus at̄ p̄fatur ſciens equū illū ſore equū pedibus claudū (Anglice Foundred) eund' Equū ſore firmū (Anglice Sound) & abſq; aliqua claudicatione in pedibus ſuis adtunc & ibid' affirmando & aſſerendo eund' Equū eidem Willielmo p̄ magna pecunie ſumma videlt̄ p̄ octodecim libris legalis monete Anglie adtunc & ibid' fraudulent' & deceptive

ceptive vendidit cumque etiam idem Willielmus postea scil eodem primo die Julii anno Regni dicti Domi Regis nunc tricesimo tertio supradi apud London dict in paroch & warda dict cum dict Edwardo ad quend ad equum de eod Edwardo emend barganizavit Edwardus pd sciens pd ad equd fore equd pedibus claudd (Anglice Foundred) dict ad Equd fore firmd (Anglice Sound) & absq aliqua claudicatione in pedibus suis adtunc & ibidem Warrantizando eundem ad equd p ad magna pecunie summa videl p ad octodecim libris consimilis legalis monete Anglie adtunc & ibid eid Willielmo fraudulent & deceptive vendidit Cumq etiam postea scil eodem primo die Julii anno tricesimo tertio supradi apud London dict in paroch & warda predi predictus Edwardus in Consideratione ad octodecim libr' consimilis legalis monete Angl' p dict Williel' eidem Edwardo solvend ac Consideratione quod dict Willielmus adtunc & ibid super se assumpsit & eidem Edwardo fideliter promisser quod ipse idem Willielmus easdem octodecim libras dict Edwardo indilate solvere vellet super se assumpsit & eidem Willielmo adtunc & ibidem fidelit promisit quod ipse dict Edwardus quend ad equd firmd (Anglice Sound) & absq aliqua infirmitate in Corpore suo sive claudicatione (Anglice Lameness) in pedibus suis adtunc & ibid vendere & deliberare velle dict tamen Edwardus promission & Assumpcion suas dict sic ut premitur fact minime curans sed machinans & fraudulenter intendens eund Willielmum in hac parte callide & subdole decipere & defraudare adtunc & ibidem falso & deceptive pro summa octodecim libr' ult mentionat vendidit & deliberavit eidem Willielmo eund ad equd claudd (Anglice Foundred) & claudd (Angl' Lame) in

in pervius suis unde Item Willielmus dicit quod ipse deteriorat' est & dampnum habet ad valentiam viginti libr' Et inde producit sectam, &c. Cl. Ent. 932.

Pleg' de pros' { Johannes Doe & Richardus Roe.

References to all the printed Precedents of Declarations and Pleas in Actions on the Case on Warranties or for Deceits.

Pur Warrantie.

DE *equo infirmo Warrantizat. fore san'.* Ra. Entr. 9. Bis. & 58. Vet. Intr. 19. Reg. 108. Her. 228. 2 Cro. 630. Vid. 10. Pl. Gen. 18.

Simile de Spadone infirmo. Han. 84.

De equo cæco War. fore sanu' in oculis & membris. Reg. 108. bis.

De equo alterius vendit & War. fore equum def. ubi Equus fuit postea replegiat. pro proprietarium. Ash. 35. Cl. 933.

De equo conduct' War. fore habilem per itinere, ubi fuit impotens, &c. Her. 196. 1 Brownl. 38.

De bobus vendit War. fore sanos. Ub. 231.

Simile de ovibus. Her. 102. 224.

Simile de accipitre. Ub. 230.

De

De Brasio putrido War'. Ra. Entr. 9 Reg. 111. Ub. 245.

Simile de halece putrido. Reg. 96. Her. 102. 229.

De dolio vini vendit. War. fore bonum & perfect. ubi fuit corrupt' acre & insalubre. Her. 92.

De butta vini corrupt. vendit. & War. fore habilem & non corrupt'. 9. H. 6. 53.

De panno laneo ranco & non bene fullat' War'. 9 H. 6. 53.

De saccis lanæ War. continere tant'. Dig. 179. 13 H. 4. 1.

De vaccis vendit. Warrantizat. fore profect. & gravidas cum vitulis, ubi una vacca fuit sterilis & alia vacca habuit tres vuncas tantum. 1 Bro. 15.

De filo laneo vendit. War. fore bonum ad pannum laneum conficiendum. 1 Bro. 15.

Simile de velleribus Warramizatis. Cl. 394.

De ovibus vendit. War. fore sanas. 1 Bro. 30. *Simile de bobus.* Cl. Man. 111.

De vacca alterius vendit & War. fore vaccam def. Tho. 40.

De vacca infirma vendit. Warrant. fore sanam. Tho. 40. *Simile,* Cl. Man. 148.

Simile de vervicibus. Tho. 40.

Simile de caseo & butyro Warrantizato. Cl. 935.

Simile de Lupulor' radicibus Warrantizat'. Cl. 935.

De Spadone infect. cum morbo voc. le scab. War' fore sanum. Tho. 30.

Simile de Spadone infected with the Glanders. 2 *Mod. Intr.* 89.

De venditione equi pro cella carbonum. Cl. 936.

Simile de vino inſalubri vendit. Warrantizando fore ſanum & ſalubre ad bibend'. Cl. 938. *Et pro deceptive detention' al. vini ultra tempus appunctuat'.*

De panno laneo War' continen' tant' in menſura. Tho. 34.

De Pappro War' fore bonu' integru' & minime laceratum. Br. R. 18.

De maeremio putrid' vendit. War. fore bonu' & pro uſu idoneum. Br. B. 80.

(1.) *Pro eo quod def. fraudulent. vendidit equum quer' pedibus claudu' Anglice* foundred *affirmando fore firmu'.* (2.) *Pro eo quod def. fraudulent. vendidit al. equu' quer. pedibus claudum Warrantizando fore firmum.* (3) *Pro eo quod def. promiſit pro prætio vendere quer' al. equu' abſq; infirmitate, &c. falſo & deceptive deliberavit quer. equum claudum Angl'* foundred. Cl. 932.

Bar' al' Warranty.

Non Warrantizavit: Ra. Entr. 9. Vet. Intr. 19. 1 Bro. 39. Cl. 939.

Simile ove proteſtation'. Ub. 231.

Quod Warrantizavit equum lib'm a quacunque nota infirmitate Et traverſ. War' generalment. Her. 223.

Quod ſuper vendic' ovium Aſſump' quod ſi aliqua earundem obiret de tali morbo ante feſtum tunc quer. ſuper notic' ſolveret pro eadem juxta ratam, & nulla notic' fuit dat. Et traverſ. War. Generalment. Her. 224.

De victa inſana Bar. quod fuit ſana Et trāverſe quod detent. fuit variis infirmitatibus Iſſue inde. Br. R. 95.

Pur Deceit.

De equo alterius vendit. quer'. Her. 102, 224. Aſh. 35.

Simile de equo permutat. pro equo quer'. Her. 77.

Pur Brewer v. Malſter de corrupto vendit. Aſh. 36.

Def. vendidit ceram quer' & deliberavit ei partem inde mixtam cum Roſſino, &c. Dyer 75.

Verſus unum Goldſmith qui vendidit quer' unum Saphir pur un' Diamond. Her. 102.

Verſus un' Butcher qui vendidit carnem quer' per falſa pondera. Ub. 221.

De ſcripto fact' quer' per def falſo nomine Baptiſmatis. Her. 222.

Ludendo cum quer' al' Ticktack cum falſis aleis. Co. Entr. 8. Fubr. 95. Reg. 290. Ub. 233.

Def. ſuper brevi direct. Archiep' ſur iſſu in Quare imp' ſine noticia Archiep' in ejus nomine falſo retornavit quod W. fuit admiſſus ad præſentac' ducis, &c. per quod Judiciu' fuit habit' verſus quer'. Her. 245.

Verſus nuper ſervien' vicarii defunct' qui poſt ejus mortem vendidit quer' lanam pro decimis unde quer. fuit poſtea onerat. erga Epiſcop tempore vacationis. Ra. Entr. 592.

De brevi impetrat' nomine quer' inde ignoran'. Reg. 112.

Simile in Q. Imp' inde non pros' per quod ejus Clericus fuit amot'. Reg. 112.

De Statut' mercatorio recogn. per def. nomine quer' inde ipſe fuit poſtea capt'. Reg. 112, 114, 115.

Pro

Pro priore de ſigillo eor' contrafacto de preſentat. ad vicar. Reg. 112. *Simile de reſignat. vicariæ.* Reg. 114.

Simile pro al'. Reg. 116.

Quer. obtinuit Judiciu' verſus Def. in aſſiſa & pro eo quod def. nichil habuit in Com' fecit recordum inde mitti in Banco Reg. execut' habend' Et def. ſub colore proſecut' attinctæ procuravit recordum mitti in cancellaria' per quod executio eſt elongat'. Reg. 113.

Quer. tulit breve de terris v. def. qui placitavit finem Replic' per miſnoſm' & def. ad diem dat' procuravit ignot. venire nomine quer' & cogn' placitum def. Reg. 113.

Quer' tulit. breve de placito terre verſus def. qui ad diem dat. fecit protectionem porrigi ſub falſo colore ubi def. tunc fuit in Anglia. Reg. 113, 116. 20 H. 6. 10. Ra. Entr. 492, 493. bis. Vet. Intr. 81.

Verſus Magiſtru' & ſervien' de procuratione ſervien' recordari pro Attorn' quer. in placito terræ pros' per magiſtru' verſus eum unde Eſſen' calumpniat'. Reg. 67.

Def. procuravit ignot. venire in Cur' & vocare ſe per nomen quer' & facere def. Attorn' in t'no & Def. fuit abſens tempore capt. Jur. per quod 40 li. fuer. recuperat' pro dampnis verſus quer'. Reg. 113.

De procurat' Attorn' fieri quer. ſine noticia ſua in placito terræ per cujus defalt. quer. amiſit terram. Reg. 114, 115.

Pur cognizor de ſtat. Merchant. ver. Cognizee qui poſt Execut' habit, de terris & ſatisfactionem ſuperinde cepit quer. Reg. Judic. 37.

Simile ubi dimiſit terras in ſatisfactione de brevi Reg. Judic. 37.

Simile ubi ſolvit debitum & habet acquietant. Reg. Judic. 37.

Simile ubi Quer. ſolvit debitum & cognizee deliberavit ſcriptum nomine acquietantie & poſtea cepit quer' ſuper ſcripto ante dict'. Reg. 62.

De Indentura fabricat. ad turband' quer' de Terris empt'. Ra. Entr. 357.

Simile pro exec' de teſtamento fabricat. Ra. Ent. 358.

Def. per nomen R. Crew *recuperavit da' verſus quer. & alium & per nomen* R. Caro *obtinuit Ca' ſa' & fecit quer. cepi ſuperinde.* 1 Bro. 254.

Verſus Conſiliarium qui revelavit conſilia quer' per quod fuit vexat' in poſſeſſione terræ. Ra. Entr. 2. Vet. Intr. 22.

Verſus Conſiliarium retent. procuravit ſtatum fieri ad uſum quer. & poſtea retent. per alium procuravit formedon tuli ver. quer. & placitavit ver. quer. ſuper triatione Et breve poſtea diſcont. Ra. Ent. 2. Vet. Intr. 51.

Verſus conſiliarium qui retent' pro quodam c'to pro quer aſſump' eſſe de conſilio ſuo ad terras emend. vel pro termino obtinend' & poſtea revelavit conſilia ſua al' W. & devenit de conſilio cum eo, & perquiſivit pro eo terras pro termino annorum. 11. H. 6. 25.

De vacca alterius vendit. quer'. 1 Bro. 27.

Simile de equo alterius in excambio pro equo quer. & def. pretend' equum fore ſuu'. Cl. 72.

De lana empt. per quer. de def. & vendit. alteri Pl. Gen. 14. 19. Rol. Entr. 29.

Pro deceptione & non per formation' bargain concernen' cubit Wood. Cl. 96.

Def. fea. obligation' quer. pro falſum nomen Baptiſmatis. 1 Bro. 27.

Def. procuravit homines ignot. per falſa nomina devenire manucapt. pro W. per quod W. permiſſus fuit fuit evadere & quer' amiſit debitum. 1 Bro. 87.

De

De procur. tione quer. fore malitioſe utlagat. in Banco R. & capt. ſuperinde. 1 Bro 87.

De Ludendo cum quer' al. Hazard cum falſis aleis & Aſſumpſit pro 120 *l. per def. de quer. recept'.* 2 Bro. 14. *Simile,* Cl. Man. 123.

Simile cum falſis cartis pictis ad Ludendum voc' one and Thirty. *Tho.* 26.

Verſus Laniu' qui vendidit ſevu' quer' per falſa pondera. Han. 32.

Simile verſus unum qui vendidit grana per falſam menſuram. Tho. 25.

Verſus unum Bargeman de Braſeo ei deliberat' ad carriand' qui non deliberavit tant. quartia quant. recepit de quer. Ra. Entr. 31.

Pro venditione halicium corrupt. Cl. Aſs 215.

In Conſid' quod quer. permitteret J. tunc arreſtat. & in cuſtod. ad ſectam quer' ire ad largum def aſſump' eu' redeliberare tali die aut debitum & miſas in ſecta ſolvere. 1 Bro. 16.

Verſus mercator' qui procuravit priſonar. quer. capt' in rebellione in Hibernia evadere contra volunc' quer' qui pro vita ſalvanda & redemption' ſua habuiſſet 1000 *coron'.* Ra. Entr. 99.

Pro retorn' qui recuperavit pro def. Judicium de non pros. breve verſus M. cui def. ſecreto dedit relaxation' & def. non habens notitiam inde cepit M. in executione pro miſis, ſuper quo M. implacitavit quer' Et dampna verſus eum recuperavit. Br. R. 68. Bro. Vad. 39.

De falſa preſentatione fact' per Jurator' ad cur. manerii per quod alius admiſſus fuit & quer' de bargaina fraudulent' deprivatus fuit. Br. R. 17.

De malitioſa proſecutione & captione quer' ſuper brevi de Ca. Sa. in nomine alterius abſque Warranto. Br. R. 47.

Pro Vic. verſus unum capt. in Executione qui in Cons' quod quer. permitteret eum ire ad Largum cum 2 ſervientibus circa negotia aſſump. ſe reddere priſonar' quer. infra unum diem per quod quer' onerabil' de debito. Ra. Entr. 26.

Def. in Cons' 22 s. promiſe deliver. le quer. (eſteant in Cuſtod. ſur' arreſt.) deins 3 ou 4 Jours & ne fiſt. mes compel' luy deſtre detain per 7 ſemains. Ra. Entr. 40.

Eo quod def. affirmans ſe eſſe perſon' cui legatio fuit Legat. ill' recepit ubi revera non fuit Legatee. Cl. Aſs. 219.

Societas Anglicana negotian' ad Indos verſus Societat. Mercatorum London ſuper Statut' pro levand' ſummam non exceden' duos Milliones eo quod Societas Mercator. falſo & malitioſe clamabant diverſa bona importat. & forisfact. per quod Societas Anglicana perdidit 3 partes forisfact. Cl. 55.

Deceit. Sur vendition' hordei affirmando fore idoneum ad ſeminand', &c. & deliberand. hordeum infirm. & combuſt. Anglice Mow-Burnt. Cl. 937.

Bar. al. Deceit.

Al' Narr. de cognitione ſatisfaction. ſuper fine Warranto Barr. proteſt. quod quer' fec. ei Warrantum pro placito quod habebatur concordia inter partes. 1 Bro. 26.

Quod quer. retinuit eum ad cogn. ſatisfaction' Replic. non ret. & Exit'. Ra. Entr. 38.

Quod quer retinuit def. Replic. non retinuit. Ra. Entr. 32.

Quod def. fuit retent. per principalem in ſcript. obl. Ra. Entr. 18.

Similis

Similis Narr' Barr' quod quer' retinuit def. ad comparand. in una actione & requiſivit eum comparere pro quer. in omnibus aliis actionibus Replic. proteſt. quod non retinuit, &c. pro placito quod non requiſivit comparere pro eo in omnibus aliis actionibus Rejo. quod requiſivit & iſſue. Ra. Ent. 20.

Similis Barr. Replic. Rejo. & Iſſue. 1 Bro. 33.

Al' Narr' pro impoſitione ballii & Cognitione Judici ſine War' Bar. quod quer' per ſcriptum retinuit def. ad imponend. Balliu' & cognoſcend. Judicium Replic. quod Quer. exiſt en. homo minime literatus ſigillavit ſcriptum tanquam acquitantiam pro receptione 20 l. *& non proſecution' def. ſic ſcriptum præd. non eſt factum.* Br. R. 91.

Quod unus A. retinuit def. ad proſequend' pro quer. breve de ſuperſed' & recipiend. Nar. qui poſt lil'o petit. Juſſit ſerviend' ad requirend. de quer' reſpons' qui nullus dedit ſic def. pro defectu inſtruction placitavit non inform' Replic' quod A. non retinuit def. pro quer. & Iſſue. Ra. Ent. 99.

Verſ. Vic de falſo retorno utlegat. Bar' quod ante inquiſition' ſuper brevi de utlegat. fact. breve prerogativæ e Cur' Scaccarii emanan' direct fuit vic. ad Levand. debitum regis virtute cujus ſeiſiver. omnia bona &c. Et denar' inde levat. habuer. coram Baronibus Scaccarii & quod D. habuit nulla alia bona demur' inde. 2 Vent. 37. *Action' ne giſt.*

Non Cul' per vic. al' Action' pur Eſcape & faux retorn. Ra. Entr. 9.

Al' Nar' pur Eſcape ſur Lat. Bar' quod dof. ut vic cepit ſufficien' ſecuritat' de priſonar' ſecundum formam Statuti pro capiend. Ballium Et traverſe quod permiſit priſonar' ire ad Largum ante caption' ſufficien' ſecuritat. Replic. quod def. ante cap-

tion. ſecuritat. habuit notitiam quod breve de Lat. proſecut' fuit pro recuperation' 80 l. de debito. Tho. 64.

Simile placitum Replic. quod manucaptores non habuer ſufficien' in Com' & Iſſue. Br. R. 96.

Simile placitum. Ra. Ent. 309.

Al' Nar' verſus ballivum libertatis pro Eſcape Bar' quod non cepit nec arreſtavit. Ra. Ent. 87.

Simile verſus ſubmar' per virum & uxorem Bar' quod Ux' per aſſenſum viri mandavit def. priſonar' ire ad Largum Replic. quod Ux' non mandavit. Ra. Ent. 301.

Verſus officiar' non Cul'. Bro. met. 24.

Def. placitat que le Conveiance fuit fait bona fide & non fraudulent mes pur Valuable Conſideration. Replic. per maintenance del' Count Et Travers del bar. Rejo. & Iſſue. ſur le Travers. Re. Dec. 87, 88.

CHAP.

CHAPTER.

Of Actions on the Case on the Common Custom against Carriers and Inn-keepers.

THere were originally three Sorts of Actions grounded on the Common Custom, *viz.* for negligently keeping of Fire, against Carriers, and Inn-keepers; the first of these being taken away by a late Act of Parliament, we shall here treat of the two last in two Sections.

SECT. I.

Of Actions on the Case against Common Carriers.

ACtions upon the Case; whereas the Defendant was a Common Bargeman, and used to carry from *London* to *Milston*, and other Places in *Kent*, that he delivered unto him a Portmantua and 30 *l.* therein to carry, and gave unto him 2 *d.* for the Carriage; and that the Defendant *tam negligenter custodivit*, that it was taken from him by Persons unknown, and so he lost it. The Defendant (confessing the Receipt) pleaded that he was a Common Bargemen; but that he fearing to carry it, delivered it to *J. D.* to carry; and that he gave Notice thereof to the Plaintiff, and

Case lies *v.* Bargeman on the Common Custom.

Plea discharge.

Replication and Traverse.

and he agreed thereto, and discharged him of the Carriage. The Plaintiff traverses that he did not discharge him; and it was thereupon demurred, and adjudged for the Plaintiff, for the Delivery by this Assent is not material; but the only Matter traversable is the Discharge, which is issuable, And Error being brought, was assigned; First, Because this Action lies not against a Common Bargeman without a special Promise: But all the Justices and Barons held, That it as well lies as against a Common Carrier upon the Land. Secondly they held, That the Traverse was good; wherefore the Judgment was affirmed. 2 *Cro.* 330. *Rich v, Knesland. S C. Hob.* 17.

When no Action lies v. Bargeman for Goods thrown over-board.

If a Bargeman in a Tempest for securing the Lives of Passengers, throw over-board a Portmantua that has Sums to a great Value in it, not knowing there was Money in the Portmantua, no Action lies. 1 *Roll. Rep.* 79. the Case of *Graves* and *Barge.*

How to declare against a Lighterman for Goods spoil'd in the Carriage.

In an Action on the Case the Plaintiff declared on the Common Custom, That Lightermen ought so to order their Lighters as not to damnifie the Goods they carried; that the Defendant being a Lighterman spoil'd his Goods by letting Water come to them. 'Twas objected, That the Plaintiff had not shewed in his Declaration that the Defendant was a Common Lighterman, and that it was not precisely shewn how they were spoil'd; but the Plaintiff had Judgment. *Palm.* 528. *Symons v. Darknell.*

The Plaintiff delivered Goods to the Defendant, who was a Water-Carrier between *Hull* and *London*; the Delivery of the Goods was at *York*, and the Goods being lost, the De-

Defendant was ſued for them. And after Verdict againſt him 'twas moved in Arreſt of Judgment, Firſt, That it did not appear that there was any Agreement with the Carrier to pay any certain Sum. Secondly, That the Defendant was only obliged to carry them ſafely from *Hull* to *London*, but not from *York* to *Hull*; but the whole Court reſolved, That the Defendant by a general Receipt of the Goods at *York*, is obliged to convey them thence ſafely, tho' it was not mentioned. As to the other Exception, the Court ſaid the Carrier might have recovered on a *Quantum meruit*; and therefore tho' no particular Agreement was made for the Price, was chargeable in this Action. 2 *Sid.* 36. *Nicolls v. Moore.*

Caſe lies on the Common Cuſtom *v.* Maſter of a Ship for Goods taken out by Force.

An Action upon the Caſe was brought, in which the Plaintiff declared, That whereas according to the Law and Cuſtom of *England*, Maſters and Governors of Ships, which go from *London* beyond Sea, and take upon them to carry Goods beyond Sea, are bound to keep ſafely Day and Night the ſame Goods without Subſtraction, *ita quod pro defectu* of them they may not come to any Damage: And whereas the 15 of *May* laſt, the Defendant was Maſter of a certain Ship called the *William and John*, then riding at the Port of *London*, and the Plaintiff had cauſed to be laden on Board her three Trunks, and therein 400 Pair of Silk Stockings, and 174 Pound of Silk, by him to be tranſported for a reaſonable Reward of Freight paid; and he then and there did receive them, and ought to have tranſported them, *&c.* But he did ſo negligently keep them, that in Default of ſufficient Care and Cuſtody of him and his Ser-

Servants, 17 *May*, the ſame were totally loſt out of the ſaid Ship.

Upon Not guilty pleaded, a ſpecial Verdict was found, (*viz.*) That the Ship lay in the River of *Thames*, in the Port of *London*, in the Pariſh of *Stepney*, in the County of *Middleſex*, *prout*, *&c.* That the Goods were delivered to the Plaintiff on board the Ship, *prout*, *&c.* to be tranſported to *Cadiz* in *Spain*; that the Goods being on Board, there was a ſufficient number of Men for to look after and attend her, left in her.

That in the Night came 11 Perſons, on pretence of preſſing of Seamen for the King's Service, and by Force ſeized on theſe Men, (which were four or five found to be ſufficient as before) and took the Goods.

That the Maſter was to have Wages from the Owners, and the Mariners from the Maſter.

That ſhe was of the Burthen of 150 Tun, *&c.*

So the Queſtion was upon a Trial at Bar, whether the Maſter was chargable upon this Matter?

It was inſiſted on for the Plaintiff, That he who took the Goods to carry for Profit, ought to keep them at his Peril. To which it was anſwered, That there was no Negligence appeared in the Maſter; by the Civil Law, if Goods are taken by Pirates, the Maſter ſhall not anſwer for them; and this is not the Caſe of a Carrier, for tho' here the Goods are received at Land, yet they are to be tranſported, and being one intire Contract, they ſhall not be under one Law in the Port, and another at Sea; the Maſter is not

not liable in case of Fire or Sinking the Ship; every one knows the Ship is liable to inevitable Accidents, and there is no Case of this Nature in Experience. And Serjeant *Maynard* added, That this differed from the Case of a Carrier; for that he is paid by the Owner of the Goods, but here the Master is Servant to the Owner of the Ship, and he pays him, and not the Merchant. The Court inclined strongly for the Defendant, there being not the least Negligence in him; but it was appointed to be argued. It was agreed on all Hands, That the Master of the Ship should have answered in Case there had been any Default in him or his Mariners.

The Case was argued two several Terms at the Bar, by Mr. *Holt* for the Plaintiff, and Sir *Francis Winnington* for the Defendant, and Mr. *Molloy* for the Plaintiff, and Mr. *Wallop* for the Defendant; and by the Opinion of the whole Court, Judgment was given for the Plaintiff.

Hale delivered the Reasons as followeth;

First, By the Admiral Civil Law the Master is not chargeable *pro damno fatali*; as in Case of Pirates, Storm, *&c.* but where there is any Negligence in him, he is.

Secondly, This Case is not to be measured by the Rules of the Admiral Law, because the Ship was *infra corpus Comitatus*. Then the first Reason wherefore the Master is liable is, because he takes a Reward; and the Usage is, that half Wages is paid him before he goes out of the Country. Secondly, If the Master, would he might have made a Caution for himself, which he omitting, and taking in the Goods generally, he shall answer for what happens. There was a Case not long since,

ſince, when one brought a Box to a Carrier, in which there was a great Sum of Money; and the Carrier demanded of the Owner to know what was in it, who anſwered, That it was filled with Silks, and ſuch like Goods of mean Value; upon which the Carrier took it, and was robbed; and reſolved that he was liable: But if the Carrier had told the Owner that it was a dangerous Thing, and if there were Money in it, he durſt not take Charge of it, and the Owner had anſwered as before, this Matter would have excuſed the Carrier.

Thirdly, He that would take off the Maſter in this Caſe from the Action, muſt aſſign a Difference between it and the Caſe of a Hoyman, Common Carrier or Innholder.

'Tis objected that the Maſter is but a Servant to the Owners.

Anſwer. The Law takes Notice of him as no more than a Servant. 'Tis known that he may impawn the Ship if occaſion be, and ſell *bona peritura*; he is rather an Officer than a Servant; in an Eſcape the Gaoler may be charged, tho' the Sheriff is alſo liable; for *Reſpondeat Superior*. But the Turnkey cannot be ſued, for he is but a meer Servant: By the Civil Law the Maſter or Owner is chargeable at the Election of the Merchant: 'Tis further objected, That he received Wages from the Owners. Anſwer. In effect the Merchant pays him, for he pays the Owners Freight, ſo that 'tis but handed over by them to the Maſter; if the Freight be loſt, the Wages are loſt too; for the Rule is, Freight is the Mother of Wages: Therefore tho' the Declaration is, That the Maſter received

Wages

Wages of the Merchant; and the Verdict is that the Owners pay it, 'tis no material Variance.

Objection 'Tis found, that there were the uſual number of Men to guard the Ship.

Anſwer. True, for the Ship, but not with Reference to the Goods; for the Number ought to be more or leſs, as the Port is dangerous, and the Goods of Value. 33 *H.* 6. 1. If Rebels break a Gaol, ſo that the Priſoners eſcape, the Gaoler is liable; but it is otherwiſe of Enemies. So the Maſter is not chargeable, where the Ship is ſpoiled by Pirates; and if a Carrier be robbed by a hundred Men, he is never the more excuſed. 1 *Vent.* 190, and 238. *Morſe v. Slue.* *S. C.* 2 *Keb* 866. *S. C.* 2 *Lev.* 69. *S. C. Raym.* 22. *S. C.* 1 *Mod.* 85.

Goods are ſpoiled by the Default of the Maſter of a Ship employed by the Owners, the Owners are liable in reſpect of the Freight.

Caſe againſt *A.* and *B.* Part-Owners of a Ship; for that he put Goods on board, and the Defendant undertook to carry them ſafely for Hire, but yet was ſo negligent that the Goods were ſpoiled. Upon Not guilty pleaded, in Evidence it appeared that *C.* and *D.* were alſo Part-Owners, and that the Ship was under the Care of a Maſter, to whom the Goods were delivered; and this being found Specially, it was argued *pro Quer'*, That the Action is grounded on the Wrong, and may be againſt all, or any of the Proprietors: There was alſo another Doubt ſtarted, and that was, Whether the Owners were liable, when in truth they did not undertake, but in Fact the Maſter *ſuper ſe ſuſcepit? Eyre*, Juſtice, held, There was no Difference between a Land-Carrier and a Water-Carrier, and that the Maſter of a Ship was no more than a Servant to the Owners in the Eye of the Law;

Action lies againſt the Owners.

and

For he that employs a Servant undertakes for him.

and that the Power he has of Hypothecation, *&c.* is by the Civil Law. *Et per Holt*, Chief Juſtice, The Owners are liable in Reſpect to the Freight, and as employing the Maſter; for whoever employs another is anſwerable for him, and undertakes for his Care to all that make Uſe of him. Secondly, the Court held, That all the Owners are liable, for they are charged in point of Contract, as Employers, and are equally entitled to the Freight; either Maſter or Owners may bring an Action for the Freight; but if the Owners bring an Action they muſt all join, *ergo* they muſt all be joined; as the Freight belongs to all, ſo all are equally Undertaking; and a Breach of Truſt in one, is a Breach of Truſt in all; as where two make one Officer, the Act of the one is the Act of the other. Thirdly, The Court held, This was not an Action *ex delicto*, but *ex quaſi contractu*; and it was not the Contract of one, but of all; that there was no other Tort but a Breach of Truſt; wherefore the Court gave Judgment for the Defendant, becauſe all the Owners were not joined. 2 *Salk.* 440. *Baſon v. Sandford & al' S. C. Show.* 29, 101.

But the Action muſt be brought againſt all the Part-Owners.

When the Carrier, not the Owner of the Goods ſhall have the Action.

If a Carrier take Goods to carry to *D.* and they in a Common Inn are ſtole, the Owner of the Goods, not the Carrier, ſhall have an Action for them. See *Daliſon* 8. and *Quære.*

This Action lies by the Common Law.

Tho' in Actions againſt Carriers generally, 'tis laid to be by the Cuſtom of the Realm, yet it is indeed Common Law; and the Declaration is good with ſetting forth the Cuſtom, tho' it is the more uſual Way, and, according to ſome Opinions, the beſt, to ſet forth

forth the Custom. *Hob.* 17. *Rich v. Kneeland.* 2 *Sid.* 245. *Mathews v. Hopkins.*

Carrier is liable by Reason of the Hire he taken.

The Carrier is liable by Reason of the Reward he receives for the Carriage, tho' he is robbed. 5 *Mod.* 89. *Dalston v. Samson.* 2 *Vent.* 239. *Morse v. Slew.*

On Declaration v. Common Carrier, how to describe the Things loft.

In an Action against a Common Carrier; the Plaintiff declared, That he was possessed of divers Goods (*viz.*) *Quatuor poculis argenteis uno poculo argenteo duabus seriebus aurearum fibularum* (*Anglice* Sets of Gold Buttons) *una serie Cyanorum & Granatorum* (*Anglice* a Set of Turks and Garnets) and of divers other Things in the Declaration mentioned; and that he delivered them to the Defendant to carry from *Bury St. Edmonds* to *London*, there to be safely delivered to the Plaintiff, and that he paid the Defendant 3 Shillings for the Carriage; and that the Defendant afterwards, thro' Negligence lost them. The Defendant pleaded Not guilty; and after Verdict for the Plaintiff, it was moved in Arrest of Judgment, That the Declaration was insufficient. First he declares of four Silver Pots, and then afterwards of one Silver Pot, and doth not say, *uno alio poculo*; and the same Omission there is in divers other Parts of the Declaration; *sed non allocatur*; for if for the Word *alio* or *alia* the Thing shall be taken to be the same, and so a Tautology, then the Jury shall not be supposed to have given Damages for the Things so laid; and if in Construction they are to be taken as divers Pots, then Damages are well given for them.

Secondly, And that which was most insisted on was the Incertainty of a Set of Buttons, and not said how many *Turky* Stones, and how many Garnets; as an Action of Trover *pro ducentis ovibus matricibus & agnis* has been held naught, for not setting forth how many Ewes and how many Lambs.

But the Court here held the Declaration well enough; for a Set is a sufficient Certainty, being intended to be well known to those that deal in such Things, and in what Number the Precious Stones are placed in such Sets. The Case of *Tailour* and *Wells*, *Trin.* 21. *Car.* 2. *Rot.* 302. *B. R.* Trover *decem pariium velorum & tegularum* (*Anglice* ten Pair of Curtains and Valens) where the Plaintiff had Judgment, is incertain. In *Style* 419. Trover for two Pieces of Cloth. *Vide Cro.* 244. a Hatband set with Pearls and Diamonds; the Plaintiff had Judgment in Trover. *Sed Nota.* In that Case no Exception was taken to the Incertainty. *Mod. Rep.* 46. and *Sid.* 445. *Herbert* and *Lane*. *Vide Style* 370. An Action against an Innkeeper for a Pack of Cloths, and other Goods lost. *Sic Nota*, A Carrier's Pack a sufficient Certainty. 2 *Ven.* 78. *Chamberlain v. Cook.*

When a Stage Coachman may be a Carrier within the Common Custom of the Realm.

An Action upon the Case upon the Custom of the Realm was brought against the Defendants, being Masters of a Stage-Coach; and the Plaintiff set forth, That he took a Place in the Coach for such a Town, and that in the Journey the Defendants lost a Trunk of the Plaintiff's. Upon Not guilty pleaded, upon the Evidence it appeared, That this Trunk was delivered to the Person that drove the Coach, and he promised to take Care of it,

it, and that the Trunk was loſt out of the Coachman's Poſſeſſion; and if the Maſter was chargeable with this Action? was the Queſtion. *Holt*, Chief Juſtice, was of Opinion, That the Action did not lie againſt the Maſter; and that a Stage-Coachman was not within the Cuſtom as a Carrier is, unleſs ſuch as take a diſtinct Price for Carriage of Goods as well as Perſons, as Waggons with Coaches; and tho' the Money be given to the Driver, yet that is a Gratuity, and cannot bring the Maſter within the Cuſtom; for no Maſter is chargeable with the Acts of the Servant, but when he acts in Execution of the Authority given by his Maſter; and then the Act of the Servant is the Act of the Maſter: And the Plaintiff was nonſuited. 3 *Salk.* 282. *Middleton verſus Fowler.*

SECT. II.

Of Actions on the Caſe againſt Carriers.

All the Law concerning Innkeepers may be explaind by the Writ.

ACtions on the Caſe againſt Inn-keepers are, as indeed all Actions on the Caſe are, but of Modern Invention, and introduced by thoſe who are probably ignorant of the proper Remedy the Law gave in ſuch Caſe; for it appears by the Regiſter, *fol.* 105. That Actions againſt Inn-keepers were originally Actions of Treſpaſs. The Writ runs in theſe Words;

The Form thereof.

REX vicecomiti Hunt' salutem & T. de M. subescaetor noster in Comitatu Worth' fecerit te securum de clamore suo prosequendo tunc pone, &c. B. de H. &c. ad respondend' tam nobis, &c. quare cum secundum legem & cons' Regni nostri Angl' hospitatores, qui hospitia communia tenent ad hospitandum homines per partes ubi ejusmodi hospitia existunt transeuntes & in eisdem hospitant', eorum bona & catalla infra hospitia illa existentia absque subtractione seu amissione custodire die & nocte teneantur ita quod pro defectu dictorum hospitatorum aut servientium suor' hospitibus hujusmodi damna non eveniant ullo modo quidam malefactores quandam cameram in qua pred' T. veniendo per negotiis nostris versus London infra hospitium pred' B. apud H. hospitatus fuit in defectu ipsius B. vi & armis noctanter fregerunt, & bona & catalla ejusdem T. ad valenciam viginti librarum ibidem inventa necnon viginti libras de denariis in pecunia numerata ibidem existentia ceperunt & asportaverunt, & alia enormia, &c. ad nostri damnum & contemptum & ipsius T. dispendium non modicum & gravamen ac contra pacem nostram & habeas, &c.

And it is well observed by my Lord *Coke* in his 8th *Rep. p.* 32. in *Caly's* Case, That the Writ is the Ground of the Common Law; and that all the Questions concerning such Actions may be resolved by a proper Application and Constructions thereof. For,

First, The Party that is chargeable as an Inn-keeper, must be a Common Inn-keeper; and no other Persons but such, are chargeable for the Goods that are lost by those they entertain. See *Coke ubi supra.*

Se-

Secondly, Inns are for Travellers; and if a Neighbour come and desire a Lodging, such Person is not a Guest to recover in an Action against the Inn-keeper. *Coke ubi supra.* See *New Dyer* p. 158. *in the Margin.*

Thirdly, The Inn-holder is only answerable for the Things of his Guest that are within his House; therefore if at the Request of the Owner an Inn-keeper turn his Guest's Horse to Grass, and the Horse is stollen, the Inn-keeper is not answerable; otherwise if he turn'd him to Grass of his own Accord. See *Coke ubi supra.* and 4 *Leon.* 96.

Fourthly, There must be some Neglect or Default in the Inn-keeper or his Servants; nor will it be any Excuse to the Inn-keeper to say he delivered the Key to the Guests, nor that when the Guests delivered the Goods to the Inn-holder, that he did not acquaint him with what they were, or that the Thief is discovered; but if the Guest is robbed by his Servant or Companion, the Innholder shall not be chargeable, because it was the Guest's Fault to have such Persons with him; otherwise if a Guest is appointed to lodge with another by the Inn-keeper and he robs the Person he lodged with. See *Coke ubi supra.* and *Moore* 78. See *Dyer* 158. *New Benl.* 60.

Fifthly, Tho' the Words of the Writ are *bona & catalla*, which properly don't comprehend Writings or Deeds, which are Evidences of Rights and Choses in Action, yet by Reason of the Words *ita quod hospitibus nullum damnum eveniet*, they are comprised; and the Plaintiff in such Action may on the General Writ declare Specially; and the Words of the Writ being only concerning his Moveables,

the Inn-holder ſhall not anſwer for any Damage done to his Perſon. 8 *Coke ubi ſupra.*

Per Doderidge, If one lodge in an Inn three Days ſucceſſively, the Inn-holder is not anſwerable for his Goods if they are ſtole out of his Chamber; by the Old Law a Perſon was called a Traveller the firſt Day, no Body knowing whence he came nor where he went; on the ſecond Day he was called *Hogen Hinde*, and the third Day a menial Servant; and by the Old Charges in Leets it appears that the Inn-holder was reſponſible for him as his Servant. *Latch* 88. *Guillelm's* Caſe. *Dy.* 158.

If an Inn-keeper refuſe to provide a Traveller's Horſe with Provender, an Action on the Caſe lies. See *Keil* 50. *Dyer* 158.

If an Inn-keeper direct his Gueſt to place his Goods in a particular Room under Lock and Key, and that unleſs he puts them there that he will not be anſwerable for them, and the Gueſt refuſe it, and put them in another Place, if they are taken away the Inn-keeper is not chargeable with them. See *Dyer* 266. See *Moore* 158.

Caſe *ver.* Inn-holder is a local Action.

An Action upon the Caſe was brought againſt an Inn-keeper upon the Cuſtom of *England*, for the ſafe keeping of the Things and Goods of their Gueſts, and he brought this Action in another County than where the Inn was; and it was ſaid by *Clinch*, Juſtice, That if it be an Action upon the Caſe, upon a Contract, or for Words, and the like tranſitory Things, that it may be brought in any County; but in this Caſe he ſaid, It ought to be brought where the Inn is. *Godb.* 42.

An

An Action upon the Case against an Inn-keeper of *Stratton-Audley* in the County of *Oxon*, and declares upon the common Custom of the Realm, That an Inn-keeper should keep the Goods of his Guests safely, *&c.* The Defendant pleaded, That when the Plaintiff lodged with him, he was sick, and of *non sane memory* by occasion of his Sickness, whereof he then languished. And it was thereupon demurred, and adjudged without Argument for the Plaintiff. For the Defendant, if he will keep an Inn, ought at his Peril to keep safely his Guests Goods; and altho' he be sick, his Servants then ought carefully to look to them; and to say he is of *non sane memory*, it lieth not in him to disable himself, no more than in Debt upon an Obligation; wherefore it was adjudged for the Plaintiff. 1 *Cro.* 622. *Cross v. Andrews.*

An Action lies against Inn-holder tho' he was of *non sane Memory.*

Mason brought an Action upon the Case against *Grafton*, for Goods imbezilled out of his Inn, and found for the Plaintiff. In Arrest, it was excepted, That he had not alledged it to be *in Communi Hospitio* (*Quære* if both in the Writ and Declaration) yet because the Declaration laid the Custom for Common Inns, and then laid, That he was *Hospitator in hospitio*, the Plaintiff had Judgment; for it shall be intended (and it is) *Domus, non Hospitium*, if it be not *Commune.* *Hob.* 245. *Mason v. Grafton.*

How to shew it was a Common Inn.

In an Action upon the Case, and declares upon the Common Custom of the Realm, That in Common Inns the Inn-keepers ought to keep the Goods of their Guests safely, and all other Goods brought into their Inns under their Custody, without Substraction,

The Master may bring an Action for Goods stole from his Servant.

That one *William Beedle*, Servant to the Plaintiff, was lodged at the Defendant's Houſe, in *Duncburch*, and that he having there a Bag, with 60 *l.* the Monies of the Plaintiff, therein, *quidam malefactores* to the Plaintiff unknown, the ſaid Bag of Money in the ſaid Inn being, being in Default of the Defendant and his Servants, took and carried away. The Defendant pleads Not guilty, and found againſt him; and it was moved in Arreſt of Judgment, and after aſſigned for Error, That the Action ought to have been brought by the Servant, and not by the Maſter; for the Cuſtom of the Realm is only for Travellers; and here the Maſter is not a Traveller; but it was adjudged that the Maſter might well have the Action; and that ſo it had been reſolved before theſe Times. Secondly, It was moved, That this Cuſtom was not well alledged; for there is not any ſuch Cuſtom, That *bona & catalla aliquorum aliorum ſubditorum, &c.* ſhould be ſafely kept unleſs they were Gueſts; *ſed non allocatur*; for the Cuſtom is ſufficiently alledged to maintain the Action. Thirdly, It was aſſigned for Error, That the Judgment was not well entred; for it ought to have been *quod capiatur*, and not *in miſericordia*, according to the Precedents. *Hill.* 9 *H.* 7. *Rot.* 310. the Old Book of Entries, 377. which is a *Capias*; for this Action compriſeth in itſelf a Contempt *contra legem, &c. Sed non allocatur*; for it is not any ſuch Attempt for which the King can have any Fine, as it is in Actions *contra pacem*; wherefore it was adjudged for the Plaintiff; and this Judgment was affirmed in the Exchequer-Chamber. See this Caſe reported with theſe Reaſons, *Coke's New Book of Entries*, fol.

fol. 347. 2 *Cro.* 224. *Beedle versus Morris.* S. C. *Telv.* 162.

It was adjudged, That the Master may have an Action against the Common Ostler, if a Servant be robbed there, and he need not shew that the Servant was in his Journey, for he may be at the End of his Journey, as at *London* about his Business. Sir *William Sands* Case was vouched. *Term.* 7 *Jac. Rot.* 1535. *B. R.* It was between *Beedle* and *Morris*, where the Plaintiff had the Action. *Noy* 79. *Drope* against *Thairye.* S. C. *Poph.* 179. S. C. *Latch* 126.

Whether if a Guest leaves his Cloths two or three Days at the Inn, and on his Return they are lost, is the Inn-keeper chargeable.

In an Action upon the Case; upon the Common Custom of the Realm, against the Defendant, being an Inn-keeper of *Uxbridge*, for not keeping safely the Goods of the Plaintiff, being his Guest. Upon Not guilty pleaded, it was found by Special Verdict, That the Plaintiff being a Guest in the said House, went from thence to *London*, and left his Goods to the Defendant, saying, He would return within two or three Days, and in the Interim his Goods were stolen when he was Absent; and whether the Defendant, as an Inn-keeper, by the Common Custom of the Realm, shall be charged without any Special Promise for the safe keeping of them? was the Question. *Foster*, Serjeant, for the Plaintiff, moved, That he should; for when he was a Guest, and left his Goods for so short a Time, and promised to return so soon, and returned accordingly, he is all that Time accounted as a Guest, and shall be said to be a Guest to charge the Defendant as an Inkeeper, according to the Custom of the Realm: And it was adjudged in the Case of Sir *Edwyn Sands*

Sands where he came to an Inn, and lodged, and went out thereof in the Morning, and left his Cloak-bag there, intending to return at Night, and at Night returned accordingly; and in the interim his Cloak-bag was ſtolen; that he might have his Remedy by an Action grounded upon the Common Cuſtom. So here, *&c.* Wherefore, *&c. Williams*, If one comes to an Inn, and leaves his Goods and Horſes, and goes into the Town, and after returns, and in the Interim his Goods are ſtolen, no Doubt but he is a Gueſt, and ſhall have Remedy; and ſo was Sir *Edwyn Sands*'s Caſe: For his Abſence in Part of the Day is not material, but he is always reputed as a Gueſt. So where one leaves his Horſe at an Inn, to ſtand there by Agreement at Livery, altho' neither himſelf, nor any of his Servants lodge there, he is reputed a Gueſt, for that Purpoſe, and the Inn-keeper hath a valuable Conſideration; and if that Horſe be ſtolen, he is chargeable with the Action upon the Common Cuſtom of the Realm: But in the Caſe at the Bar, where he leaves Goods to keep, whereof the Defendant is not to have any Benefit, and goes from thence two or three Days, altho' he ſaith he will return, yet he is at his Liberty, and there he is not any Gueſt during that Time, nor is the Inn-keeper chargeable as a Common Oſtler, for the Goods ſtolen during that Time, unleſs he makes any ſpecial Promiſe for the ſafe keeping of them, and the Action ought to be grounded upon it; and of that Opinion were all the other Juſtices; but becauſe it was a new Caſe, they would adviſe: *Et adjournatur.* 2 *Cro.* 188. *Gelley v. Clerk. S. C. Noy* 126.

Her-

Herbert, a Carrier, brought an Action upon the Case against *Lane* an Inn-keeper, for Goods lost out of the Inn, (*viz.*) certain Packs full of Linen Cloth, and other Goods; and after Verdict for the Plaintiff it was moved in Arrest of Judgment, That it doth not appear by the Declaration what Sort of Cloths was in the Packs, nor of what Value the the Cloths and Goods were; and so the Declaration is Incertain. But *Rolle*, Chief Justice, answered, That the Declaration is good enough, especially now, there being a Verdict in the Case. *Style* 370. *Herbert* and *Lane*.

Declaration for Goods lost out of an Inn, good after Verdict, without shewing the Value or the Kind of Cloth lost.

A Precedent of a Declaration against a Common Inn-keeper.

ANtonius Gosnold Gen̄ queritur de J. Atkinson Hospitatore communis hospicii vocat le Bell and Sarazens Head without Aldgate in Custod Mar', &c. p̄ quod cum secundum legem & cons' Regni Dom̄ Regis nunc Anglie hospitatores qui communia hospicia tenent & custod ad hospitand homines per partes ill ubi hospicia existunt transeuntes & in eisdem hospitand eorum bona & catalla infra hospicia ill existen̄ absq; subtractione seu amissione salvo custod die & nocte teneantur Ita quod p̄ defectu hujusmodi hospitator' seu servien̄ suor' hospitibus hujusmodi damp̄n non evenier ullo modo ac cum p̄d J. ante decimum diem Maii anno Reg. Dom̄ Jacobi nup Regis Angl, &c. undecimo & eodem decimo die Maii anno undecimo p̄dict & toto tempore p̄d hucusq; apud London p̄dict in paroch' sancte Catharine Cree-church in warda de Aldgate, London

London tenuit & custodiit Poict' commune hospitium vocat', &c. Poict' Clerog' etiam prox' A. Poict' decimo die Maii anno undecimo suprad' ut hospes ipsius J. hospitat' fuisset ac vinos hospicio Plac' J. apud London in parochia & warda Poict' Et idem A. adtunc & ibidem viveria bona & catalla ipsius A. ppr' viz. tria par' tibialiu' Anglice Stockings ad valenc' sex solid' tria par' Chirothecar' Angl' Gloves ad valenc' decem solid' unu par' ligular' crurat' Angl' Garters ad valenc' decem denar' unu virgat' carbasi vocat' Lawne ad valenc' novem solid' duas virgat' carbasi pejoris Angl' worser Cobwed Lawn, ad valenc' trium solid' & quatuor denar' unu par' tibiat' laneorum Angl' worsted Scockings ad valenc' decem solid' unu' Indusi' Angl' a Shirt ad valenc' decem solid' unu' apinator' Angl' a Hankercheif, ad valenc' trium solid' in hospiciu' illius sub custod' ipsius J. asportavit & portavit quidam tamen malefactores eidem A. ignot' postea scil' Poict' decimo die M. anno undecimo suprad' omnia separat' bona & catalla Poict' sic in hospicio Poict' sub Custod' Plac' J. apud L. Poict' in paroch' pd existen' ob defectu' debite custod' Plac' J. & servicii' suor' infra hospiciu' Poict' abinde cepet' & asportaver' Et alia enormia ei intulit contra legem & cons' pac' ad dampn', &c. Et inde, &c. Vidian 151.

A Pre-

A Precedent of a Declaration againſt a Common Carrier.

Suff. ff. RObertus Cooke nup de Bury ſancti Edmundi in Com̃ ꝑdict Carrier attach fuit ad reſpondend̃ Johanni Chamberlain in placito tranſgr' ſup caſum, &c. Et unde idem Johannes ꝑ Thomam Folkes Attorñ ſuum queritur quod cum ꝑdict Robertus tertio die Octobris anno Regni Dom̃i Jacobi ſecundi nup Regis Angl' tertio & diu antea & continue poſtea abinde hucuſq; fuit & adhuc exiſtit Communis Portator' (Anglice a Common Carrier) & per totum idem tempus uſus fuit & conſuevit ꝑ ſeipſum & ſervient̃ ſuos cum Equis & Plauſtro (Anglice a Waggon) ipſius Roberti Carriar' & portar' bona & catalla ꝑ aliquibus ꝑſonis huiuſmodi carriatioñ & portatioñ requirent̃ ꝑ rationabil̃ mercede & ſtipendio ꝓinde ſolvend̃ ad ab & inter Bury ſancti Edmundi ꝑdict & Civitat̃ London juxta agreament̃ & ſolutioñ in ea parte faciend̃ & habend̃ Cumq; etiam ſecund̃ legem & conſuetudinem hujus Regni Angl' omnes huiuſmodi Communes portatores qui bona & catalla aliquar' ꝑſonar' huiuſmodi carriatioñ & portatioñ ſic ut ꝑfertur requirent̃ eis' deliberat̃ exiſtent̃ abſq; ſubſtractione ſpoliatione & amiſſione ſalvo ducere cuſtodire & carriare debent & tenentur ita quod ꝑ defectu vel ꝑ default̃ talis Communis portatoris vel ſervient̃ ſuor' huiuſmodi bona & catall̃ eis ſic ut ꝑfertur portand̃ & carriand̃ deliberat̃ non ſubtrahantur ſpolientur ſeu amittantur Cumque etiam ꝑdictus Johannes ꝑdicto tertio die octobris anno tertio ſuꝑradicto apud Bury ſancti Ed-

An Action upon the Caſe upon the Cuſtom of *London*, againſt a Common Carrier, for loſing of Goods delivered to him to carry.

The Defendant is a Common Carrier.

The Cuſtom of *England*.

The Particulars of the Goods delivered to him.

Edmundi Poict possessionat fuisset de bonis & catallis sequent vidilt de duabus argenteis Crateris (Angl' Salvers) una alba pelvi (Angl' a Bason) quatuor Candelabris argenteis una patina pro emunctoriis (Anglice a Snuffer-pan) und' par' argenteor' emunctoriorum (Anglice a pair of Snuffers) sex culullis (Angl' Tumblers) duobus poculis argenteis (vocat' Tea-pots) duabus seriebus (Angl' Sets) argenteorum vasculorum (Angl' vocat' Casters) quinq; argenteis ignitabulis (Anglice Chasing-dishes) tribus argenteis pixidibus p' nicotian' (Angl' Tobacco Boxes) tribus corallis cum scapis argenteis (Angl' Locket Corals) tribus poculis argenteis (vocat' Cane) quatuor poculis more Japane pictis (Angl' Japann'd Pots) quatuor poculis argenteis undetim salillis argenteis duabus lanceis argenteis duobus discis argenteis (vocat' Coffee-dishes) uno poculo argentea (vocat' a Child's Pot) una candelabro argentea (vocat' a Hand Candlestick) una argentea capula (Anglice a Ladle) duobus cultris & furculis (Anglice Knives and Forks) undetim uncis argenti fornat' in diversas argenteas nugas (Anglice Silver Toys) duabus seriebus (Anglice Sets) aureorum fibularum (Anglice Buttons) septem annulis lapideis (Angl' Stone Rings) quatuor deargent pixidis pro candelis (Angl' vocat' Gilt Sockets) duobus pixidibus p' pulvere piperitico (Anglice Snuff Boxes) quinq; par' fibularum metallinarum (Anglice Mettle Buckles) undecim fibulis septem lapidibus ornat' (Anglice seven Stone Buttons) una serie Cyanorum & Granator' (Anglice a Set of Turkes and Garnets) sex par' eorum' fibularum sex par' lapidearum fibularum (Anglice Stone Buttons) quatuor poculis p' potu Turrito unice marginatis (Anglice vocat' single tip'd Coffee-

Wants (aliis.)

Wants (alio) there being Pots and Candlesticks before.

Uncertain.

Wants (aliis.)

Coffee-dishes) duodecim longis & duodecim tu-
tundis fibulis lapideis (Anglice stone Buttons) Wants (aliis) there being Buttons before.
sex argenteis rutellis (Angl Scoops) una par' fi-
bular (Angl Buttons) una Theca argentea (vo-
cat a Springing-Case) quatuor poculis moze Ja-
panné pictis duplicat marginat (Angl vocat Japann'd double tipt Mugs) duobus poculis moze Wants (aliis.)
Japanné pictis (Anglice Japann'd Mugs) cum Wants (aliis.)
pculis unicé marginat un' par' parvorum Wants (aliis.)
Candelabrorum argentor' septem poculis lapi- Wants (aliis.)
deis (vocat Fire-stone Mugs) duobus poculis Wants (aliis) thrice.
pictis duplicat marginat sex parvis poculis (vo- Wants (alio.)
cat Mugs) duobus magnis pculis (vocat Mugs) Wants (aliis.)
duplicat marginat uno poculo (vocat a Mug)
unicé marginat tribus pixidibus pro pecunia
(Angl Money-Boxes) duobus poculis (vocat
Dram-Cups) una pixide pro tibetho (Angl a
Civet Box) ptesaverim cochlearibus argenteis un-
decim argenteis furculis (Angl Forks) & viginti
& duabus peciis auri (vocat Guineas) ad valentiam
centum octoginta & septem librarum quindecim
solidor' & quinque denariorum ut de bonis &
catallis suis propriis, Et sic inde possessionat' ex-
istent) idem Johannes postea scil eodem tertio die
octobris anno tertio supradó apud Bury Sancti Ed-
mundi dcm Rona & Catalla illa dcó Roberto
ad eadem a Bury S. Edmundi usque Civitatem To be carried from London to Bury.
London dcm salvo ducendó custodiendó & carriandó tra-
nsmittet & deliberaret & dcó Roberto adtunc & ibidem
p manibus solvisset tres solidos legalis monet
Anglie pro carriation & portation bonorum & ca-
tallorum illorum que quidem bona & catalla dcm
dó Robertus ab eadem Bury Sancti Edmundi
dcm usque dcm Civitat London salvo ducendó
custodiendó & carriandó & dcis' tres solidos pro car-
riation & portatione eorundó adtunc & ibidem ha-
buisset & recepisset dcmus tamen Robertus bona

& catalla ꝓdict̃ post deliberationem inde eidem Roberto juxta consuetudinem ꝓdict̃ & officio sive oneris communis portator̃ ꝓ exigent̃ non carriavit usque Civitat̃ London ꝓdict̃ set idem Robertus bona & catalla ꝓdict̃ tam negligent̃ & imprudenter custodivit carriavit & disposuit quod pro defect̃ bone cure & Custod̃ ipsius Roberti bona & catalla ꝓdict̃ postea scil̃ quarto die Octobr' anno Tercio supradict̃ apud Bury Sancti Edmundi ꝓdict̃ amissa & deperdit̃ fuerunt ad dampnum ipsius Johannis ducentarum librarum Et inde ꝓduc̃ sectam, &c.

The Defendant lost them.

Not Guilty. Et ꝓdict̃ Robertus ꝑ Johann' Crasbe Attorn̄ suum ven̄ & def. vim & injur' quando, &c. Et dicit quod ipse in nullo est cul̃ de premissis superius ei impositi prout ꝓdict̃ Johannes Chamberlaine superius versus eum Queritur Et de hoc pon̄ se super Patriam Et ꝓdict̃ Johannes Chamberlaine similit̃ Joco Precept̃ est Vic̃ quod venire fac̃ hic a die sancte Trinitatis in tres septimanas duodecim, &c. Per quos, &c. & qui nec, &c. ad recogn̄, &c. quia tam, &c. 2 Ven. 75. Chamberlaine v. Cooke.

Re-

References to all the Precedents and Declarations againſt Inn-keepers and Carriers.

VErſus Hoſpitatorem de baggetta & denar. quer' in hoſpitio ſuo perd. Ra. Entr. 404.

De burſa cum denar'. Ra. Entr. 405. Vet. Int. 20. 1 Bro. 196.

De bonis. Ra. Entr. 404. Co. Entr. 347. Aſh. 40.

De Sarcina cum bonis & denar'. Ra. Entr. 404.

De equo. 3 Co. 32. Ub. 239. Her. 243, 250.

De Camera noctant. fract. ac bonis & denar' aſportat. Reg 105.

De burſa & denar. quer. in cuſtodia ſervientis ſui deperd. Co. Entr. 347. Ben. 169.

Simile de denar'. Reg. 104.

Verſus hoſpitatorem de bonis in hoſpitio ſuo perd. Tho. 42. Vid. 151. *Simile,* Inſt. Cl. 173.

Simile de baga cum denar. in defectu def. per malefactores aſportat. & perd. Tho. 74. Br. R. 13.

Simile de equo perd Ra. Entr. 22, 23.

Verſus Common Waterman de denar' & bonis in ciſta perd. Vid. 372. Inſt. Cl. 180, 183.

Verſ. Common Carrier de bonis & catallis ei deliberat. ad carriand. perd. 2 Ven. 75. *Simile,* 2 Mod. Intr. 91.

Pro bonis & catallis in riſco ſerat'. Br. R. 12.

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Quod def gratant. pernoctavit quer. & travers quod tenuit commune hoſpitium. Ra. Ent. 405. Vet. Intr 20. Aſh 48.

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Quod quer' requiſivit def. ponere equum ad paſtur. qui fuit ſic poſit. & abduct. per malefactores & travers quod fuit abduct' per negligen. def. vel ſervien. Replic. per maintenance de narr' & travers quod requiſivit ponere equum ad paſtur'. Her. 250.

Bona non fuer' abduct. per malefactores. Aſh. 48.

Simile in defect' def. Aſh. 48.

Veredictum & Judicium pro quer. Co. Entr. 347.

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FINIS.

PH
MVSEVM
BRITANNICVM